Supreme Court of the United States

OCTOBER TERM, 1964

No. 28

UNITED STATES, PETITIONER

vs.

GIACOMO VENTRESCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6157.

GIACOMO VENTRESCA, DEFENDENT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT'S APPENDIX

* * * *

[fols. 1-5] * * *

[fol. 6]

* * * *

August 31, 1961

APPLICATION FOR SEARCH WARRANT:

To: Honorable W. Arthur Garrity
United States Commissioner
District of Massachusetts
Worcester, Massachusetts

I, Walter A. Mazaka, Investigator for the Alcohol and Tobacco Tax Division, Internal Revenue Service, United States Treasury Department, on oath complain that I have reasonable cause to believe, and I do believe, that certain material, apparatus, articles, and devices, including a still [fol. 7] used in the manufacture of non-tax-paid liquor, together with a quanity of mash fit for distillation of distilled spirits, together with a quanity of non-tax-paid distilled spirits, are in the possession of one Giacomo Ventresca; that said material, apparatus, articles, and devices, including said still and mash and non-tax-paid liquor are now located on certain premises in the City of Worcester, in the Commonwealth and District of Massachusetts; that the premises on which said material, apparatus, articles, and devices, including said still and mash and non-tax-paid distilled spirits are now located at 148½ Coburn Avenue, Worcester, in a one-family light green wooden frame dwelling house situated at the rear of 148 Coburn Avenue, Worcester, occupied by the said Giacomo Ventresca and his family; that said Giacomo Ventresca has in his possession, in violation of 26 USC 5179(a), a still and distilling apparatus setup which has not been registered as required by 26 USC 5171(a); that he has filed no bond covering said still, in violation of 26 USC 5173; that said still is not on an approved location, in violation of 26 USC 5178; that he is in possession of mash which has been made fit for distillation and for the production of distilled spirits, in violation of 26 USC 5222(a); that he has and possesses said liquor and property with intent to defraud the revenue of the United States, in violation of 26 USC 5602 and 5686.

I hereby request a search warrant for the purpose of searching said house and all approaches and appurtenances thereto in the daytime, for the purpose of seizing said material, appartus, articles, and devices, including said still, mash fit for distillation and distilled non-tax-paid spirits illegally held on the premises.

/s/ WALTER A. MAZAKA
Investigator Alcohol and
Tobacco Tax Division
Internal Revenue Service
U. S. Treasury Department

[fol. 8] Subscribed and sworn to before me and in my presence this 31st day of August, 1961; and it appears to me that there is probable cause to believe that the foregoing is true.

/s/ W. ARTHUR GARRITY
United States Commissioner
District of Massachusetts

Approved:

/s/ WILLIAM J. KOEN
Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Commissioner's Docket No. 1

Case No. 186

UNITED STATES OF AMERICA

v

CERTAIN BUILDING, TO WIT, 148½ COBURN AVENUE WORCESTER, MASSACHUSETTS, WITH DISTILLING APPARATUS AND MATERIAL OF A CONTRABAND NATURE

AFFIDAVIT FOR SEARCH WARRANT

BEFORE W. ARTHUR GARRITY, Worcester, Massachusetts. The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an [fol.9] unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors; which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602, and 5686.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED SHEET

/s/ WALTER A. MAZAKA
Investigator, Alcohol and Tobacco Tax Div., Internal Revenue Service

Sworn to before me, and subscribed in my presence, August 31st, 1961

/s/ W. ARTHUR GARRITY
United States Commissioner

Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search is made.

On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten such bags were put into the trunk, and three were placed in the rear seat. Those in the rear seat were marked "Domino". The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the [fol. 10] car with its contents was driven into the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

On August 2, 1961 a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at

148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between two houses.

On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the same night, the Pontiac driven by Garry with Incardone as a [fol. 11] passenger was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few minutes. Incardone then drove away, and Garry went into his home.

On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

On August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car. Garry opened the trunk and then entered his house. From the trunk of the car there was [fol. 12] removed eleven five-gallon cans which appeared to be filled. Incardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave. they met Giacomo Ventresca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that empty metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's

car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sound which were heard during the handling of these cans, were consistent with that of cans containing liquid.

On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

/s/ WALTER A. MAZAKA

[fol. 13]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Commissioner's Docket No. 1

Case No. 186

UNITED STATES OF AMERICA

v.

CERTAIN BUILDING, TO WIT, 148½ COBURN AVENUE WORCESTER, MASSACHUSETTS, WITH DISTILLING APPARATUS AND MATERIAL OF A CONTRABAND NATURE

SEARCH WARRANT

To any U. S. Marshal, any of his deputies, or any other authorized person:

Affidavit having been made before me by Walter A. Mazaka, Investigator, Alcohol and Tobacco Tax Division,

Internal Revenue Service, U. S. Treasury Department, that he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts; there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors; which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179 (a), 5222(a), 5602, and 5686. and as I am satisfied that [fol. 14] there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 31st day of August, 1961.

/s/ W. ARTHUR GARRITY,
U. S. Commissioner.

* * * *

[fols. 15-25] * * *

[fol. 26]

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF DEFENDANT GIACOMO VENTRESCA FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

Criminal No. 62-257-C

The defendant Giacomo Ventresca, moves this Court to direct that the property listed in the affidavit attached [fol. 27] hereto be returned to him and that said property be suppressed as evidence against him in this proceeding.

Your defendant further says that said property was seized and taken from him during the conduct of an illegal and unlawful search and seizure on September 1, 1961 and asserts as his reasons for so saying the following:

I

Said search and seizure was not based on a search warrant issued upon a *lawful affidavit.*

1. The affidavit upon which the search warrant was issued was insufficient in law to establish "probable cause supported by oath or affirmation" within the meaning of the Fourth Amendment to the United States Constitution and of Rule 41 of the Rules of Criminal Procedure for the United States District Courts.

   (a) The affiant, Mazaka, made oath merely to the effect that he had "reason to believe" and not that he knew or did believe. His affidavit was nothing more than an affidavit based on information and belief, a basis which falls legally short of the requirement of probable cause.

   (b) The aforesaid weakness of the affidavit is not supported by any positive averments of knowledge on the part of the affiant as to any of the

alleged facts set forth in the affidavit. It is not apparent on the face of the affidavit as to which statements of fact, or whether any at all, were based upon personal knowledge of the affiant. On its face, the affidavit could well have been based entirely and completely on hearsay, even as to its most material allegations.

[fol. 28] (c) The sum total of all facts in the affidavit give support to nothing more than a conclusion or suspicion of crime and are not sufficiently indicative of probable cause to warrant an interference of the defendant's constitutional right under the Fourth Amendment to be secure in his person, house, papers, and effects.

—The facts show little more than meetings between the defendant and certain people, a transportation by car and in and out of certain houses of such items as sugar, empty tin cans, cans that "appeared" to be filled, cans that were handled and sounded like they were filled, metallic noises, and an odor of fermenting mash in the vicinity of 148 Coburn Avenue (not the premises searched).

—The affidavit contains nothing by way of actual knowledge as opposed to mere suspicion on the part of the affiant or others to support the basic allegation that the alleged liquid in the cans was liquor, or that "non-tax paid liqours" were being manufactured, possessed and distributed.

2. The affidavit upon which the search warrant was issued failed to "particularly" describe the "things to be seized" within the meaning of said Fourth Amendment and said Rule 41.

(a) It addresses itself to "certain apparatus, articles and devices . . . held and possessed, and which have been used and are intended for use in the distillation . . ." etc. etc.

(b) The fact that other personal property, such as a still, may have been described with particularity does not cure this constitutional defect in the
[fol. 29] affidavit since the items described, whether with or without particularity, were set forth in disjunctive fashion in the body of the affidavit.

II

Said search and seizure was based upon a *search warrant* insufficient on its face.

1. Said warrant did not "particularly" describe the things to be seized within the meaning of said Fourth Amendment nor did it 'identify' the property within the meaning of said Rule 41.

   (a) The warrant, like the affidavit, ordered a search for and seizure of what was merely described as "certain apparatus, articles, and devices".

2. Said warrant, as appears on its face, was apparently amended after it was issued. Such an interference would render it null and void.

   (a) Near the end of the fourth full line of the body of the warrant appears both an erasure and an interlineation marked by initials in the margin which do not appear to be those of the issuing officer.

In further support of this Motion defendant points out that he has been severely prejudiced by actions of the officers executing the search in seizing certain items which were outside the scope of the search warrant since clearly not "used or intended for use" in the commission of crime. Yet in view of the loose description in the warrant of the articles to be seized, the searching officers had little to guide them. These items, as shown on the face of the return of the warrant, were a "telephone directory", a "telephone desk directory", and "miscellaneous papers and cards".

[fol. 30] Defendant therefore alleges that the search was, in its essence, unreasonable and unlawful.

The defendant further says that an affidavit accompanies this Motion.

MAHER, MCCANN & TALCOTT

By /s/ Matthew R. McCann
MATTHEW R. MCCANN
340 Main Street
Worcester, Massachusetts

CAFFREY, D.J.

Oct. 10, 1962

By the Ct: After argument in Open Court.

Motions taken under advisement.

/s/ W. J. LYONS *Dep Clk*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AFFIDAVIT OF DEFENDANT GIACOMO VENTRESCA ON HIS MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE

Criminal No. 62-257-C

Giacomo Ventresca, being duly sworn, deposes and says:

1. That he is a defendant in this action.
2. That on September 1, 1961 he resided with his family at 148½ Coburn Avenue, Worcester, Massachusetts.
3. That on that date said premises were searched and certain property was seized by agents of the United States Government.

4. That said search of his premises was based upon an affidavit for a search warrant and upon a search warrant, copies of which are attached hereto as appendices "A" and "B" hereof.
5. That said copy of said search warrant includes a copy of the return of service by the executing officer.

[fol. 31] 6. That in the conduct of said search said agents carried off a telephone book and a telephone desk directory (alphabet punch type) both of which were in the living room of said premises; that they ransacked a leather box of personal papers which was situated on the top of my bureaus in my bedroom, and that from said box they carried off some miscellaneous papers and cards; and that they removed my wallet from my pants pocket which were hanging on a hook in my bedroom closet; that from said wallet they removed and carried away certain papers and notes; and that the search and seizure of these items was without consent.

/s/ GIACOMO VENTRESCA

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. 1962

Personally appeared before me Giacomo Ventresca and made oath that the statements contained in the foregoing affidavit are true, except as to matters alleged upon information and belief, and as to those matters he believes same to be true.

/s/ MATTHEW R. MCCANN
My commission expires
10/26/68.

[Appendices to this motion are here omitted. The Affidavit for Search Warrant appears at page 8 *supra*. The Search Warrant appears at page 13 *supra*. The Return of Search Warrant appears at page 14 *supra*.]

[Affidavit of Defendant Giacomo Ventresca on his motion for the return of seized property and the suppression of evidence in case #62-290-C is here omitted since identical with companion affidavit in #62-257-C except for the case number, which affidavit is reproduced at page 30 *supra*.]

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM AND ORDER—December 31, 1962

Criminal No. 62-257-C

CAFFREY, D.J.

The defendant Garry has filed a motion for the return of seized property and the suppression of evidence and the defendant Ventresca has filed six different motions, all of which will be realt with *seriatim*.

1. Defendant Ventresca's motion to amend his motion to dismiss is allowed.

2. Defendant Ventresca's motion for a bill of particulars is denied.

3. Defendant Ventresca's motion for separate trial is denied.

4. Defendant Ventresca's motion to strike certain words from Count 11 is denied, it having become moot by reason of the dismissal of Count 11 on September 20, 1962.

5. Defendant Ventresca's motion to dismiss the indictment as amended is based on the contention that the indictment violates Rule 8, Federal Rules of Criminal Procedure, in that it joins two or more offenses which are not (a) of the same or similar character, or (b) based on the same act or transaction or on two or more acts or transactions connected together. I believe the various counts of the indictment charge offenses of the same or similar character and may be included in one indictment consistent with Rule 8, Federal Rules of Criminal Procedure. See *Spear* v. *United States*, 216 F.2d 185 (4 Cir.

1954); *Kivette* v. *United States*, 230 F.2d 749 (5 Cir. 1956). See, also, *Orfield*, "Joinder in Federal Criminal Procedure," 26 F.R.D. 23 (1961).

Defendant Ventresca also contends that Count 7 of the indictment is duplicitous. An examination of Count 7 indicates that it adopts almost verbatim the language of Section 5686(b) which, contrary to defendant's contention, is [fol. 33] not a mere penalty provision but, on the contrary, specifically defines a substantive offense as well as the penalty therefor. Defendant Ventresca argues that Count 8 likewise is duplicitous because it alleges violations of two separate sections. A reading of Count 8 makes manifest that it charges only violation of Section 5681 (a). This count is not duplicitous.

Defendant Ventresca's motion to dismiss the indictment is denied.

6. Defendant Ventresca has filed a motion for the return of seized property and the suppression of evidence. The first argument in support of this motion is an attack on the affidavit filed by Agent Mazaka of the Alcohol and Tobacco Tax Division, Internal Revenue Service. I rule that the Agent's affidavit is sufficient, under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257. See, also, *United States* v. *Spears*, 287 F.2d 7 (6 Cir. 1961); *United States* v. *Joseph*, 278 F.2d 504 (3 Cir. 1960). *Cochran* v. *United States*, 291 F.2d 633 (8 Cir. 1961) is distinguishable in that it involved a situation in which the officers obtaining the search warrant acted solely on the basis of an informant's suspicion.

The defendant next argues that the facts in the affidavit do not constitute probable cause because there was "no sure evidence that liquor was involved . . . The cans could have contained anything." The affidavit describes seven occasions on which Garry's car was seen entering Ventresca's driveway. It recites that on four occasions the car was observed to contain bags of sugar and that on one occasion empty five-gallon metal cans were taken from the car into the house occupied by Ventresca. It recites that the agents twice detected the odor of fermenting mash coming from this house and that on three occasions five-gallon cans, apparently filled and apparently

containing liquid, were transferred from the house to the [fol.34] trunk of Garry's car. The affidavit is not inadequate for failure to recite facts tending to establish probable cause that liquor was involved in the activities of defendants.

The next contention of defendant Ventresca is that the description in the warrant of "apparatus, articles and devices . . . which have been used and are intended for use in the distillation, manufacture, possession, and distribution of non-tax paid liquors" fails to describe the things to be seized with the degree of "particularity" required by the Fourth Amendment. The description meets the test set out in Rule 41(b)(2), Federal Rules of Criminal Procedure, and a similar description has been upheld in *Nuckols* v. *United States*, 99 F.2d 353 (C.A. D.C. 1938), cert. den. 305 U.S. 626. See, also, *Merritt* v. *United States*, 249 F.2d 19, 20 (6 Cir. 1957); *Lowrey* v. *United States*, 161 F.2d 30 (8 Cir. 1947), cert. den. 331 U.S. 849.

Finally, defendant Ventresca urges the return of a telephone book, a desk directory, and various papers taken from a box on his bedroom bureau and from his trousers pocket, on the ground that these items were not designed or intended for use or used as the means of committing a criminal offense, as required by Rule 41, Federal Rules of Criminal Procedure, but, on the contrary were at most merely evidence. Defendant's contention is well taken as to the telephone book, the desk directory and the various papers. The motion to suppress is allowed as to these last three items and is otherwise denied.

7. Defendant Garry has filed a motion for the return of seized property and the suppression of evidence. The first argument in support of this motion is that the affidavit fails to establish probable cause. The affidavit filed herein is adequate for the reasons stated with regard to defendant Ventresca's motion to suppress.

Defendant Garry's second contention is that the warrant is insufficient for lack of particularity. The instant war-[fol. 35] rant is sufficient. See *United States* v. *Joseph*, *supra*; *Harris* v. *United States*, 331 U.S. 145 (1947).

Defendant Garry's final contention is that the agents seized property not described in the search warrant. The articles seized were 5 60-lb. bags of sugar, 10 empty one-gallon jugs, 7 decanters containing various amounts of liquor, one jug "Little Elves orange label" one-third full, one empty bottle "Roma Brand" flavoring cordials, and one sheet of white paper containing the notation: "6 gallons (shop), 12 gallons (A1), 3 gallons (left)." All could be classified as being within the authority of the warrant to seize "unknown quantity of non-tax-paid liquors, together with an unknown quantity of material used in the distribution of non-tax-paid liquors." See *Steele* v. *United States*, 267 U.S. 498 (1925); *Bryant* v. *United States*, 252 F.2d 746 (C.A. 5, 1958).

Defendant Garry's motion to suppress and for return of property is denied.

/s/ ANDREW A. CAFFREY
U. S. D. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM AND ORDER—December 31, 1962

Criminal No. 62-290-C

CAFFREY, D.J.

The defendant Ventresca has filed six motions herein, which will be dealt with *seriatim*.

1. Defendant's motion to amend his motion to dismiss is allowed.
2. Defendant's motion for separate trial is denied.
3. Defendant's motion for a bill of particulars is denied.
4. Defendant's motion to strike certain words as surplasage is denied. See *Schnautz* v. *United States*, 263 F.2d

525 (5 Cir. 1959); *Wong Tai* v. *United States*, 273 U.S. 77.

5. Defendant's motion to suppress evidence is allowed [fol. 36] herein to the same extent that his motion to suppress is allowed in Criminal No. 62-257, and otherwise is denied.

6. Defendant's motion to dismiss the indictment is based on four grounds, the first of which has become moot by the dismissal of Count 11 in Criminal No. 62-257. The second ground is the claim that the indictment does not contain a plain, concise, and definite written statement of the facts constituting the offense charged. The short answer to this is that the indictment closely follows the statutory language and does contain a plain, concise and reasonably definite written statement of the facts constituting the offense charged. The third ground urged by the defendant is that the indictment does not allege the place or jurisdiction where the offenses allegedly contemplated by the conspiracy were to take place. Suffice it to say that the charging part of the indictment charges the defendants with conspiring at Boston and Worcester in the District of Massachusetts, and at other places unknown to the grand jury, and these allegations are sufficient for the validity of the indictment. And, finally, the fourth ground urged by the defendant Ventresca is that the indictment is duplicitous in that it alleges more than one conspiracy. A reading of the indictment indicates that on the contrary the indictment charges one conspiracy to commit various crimes. Such a charge is not void for duplicity. The motion to dismiss the indictment is denied.

Defendant Garry has filed herein a motion for return of seized property and the suppression of evidence which is a carbon copy of the motion he filed in Criminal No. 62-257. For the reasons stated in the memorandum and order filed this date in Criminal No. 62-257, defendant Garry's motion herein is denied.

/s/ ANDREW A. CAFFREY
U. S. D. J.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STENOGRAPHIC TRANSCRIPT OF TESTIMONY

* * * *

[Jury drawn and sworn.]

[Conference at the Bench as follows:

Mr. McCann: At the outset of the trial, I would like to renew, to have it noted on the record that the Court permit the Defendant Ventresca's motion to suppress evidence in Case 62-257-C; his motion to dismiss the indictment in Case 62-257-C, and in Case 62-290-C the Defendant Ventresca moves to dismiss the indictment; the Defendant Ventresca's motion to strike certain words from the indictment as superfluous, and the Defendant Ventresca's motion to suppress evidence for the return of seized property, all of which were made earlier and which were denied following a preliminary hearing in this action and in these actions.

The Court: You are renewing the motions at this time?

Mr. McCann: I would like to renew them, and if I may, have them incorporated in the record of this case for this trial, the actual motions previously filed, and so identified.

The Court: They are in the official file. I suppose they are part of the record. In any event, without further action, they are already in the official [3] court papers. I can make the same ruling and deny it.

* * * *

Mr. McCann: Will the Court note the objection of the Defendant Ventresca to the denial of these motions at this time?

The Court: All right.

* * * *

[fols. 38-43] * * *

[fol. 44]

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANT VENTRESCA'S MOTION FOR JUDGMENT OF ACQUITTAL

Criminal Case No. 62-257-C

Now comes the defendant Ventresca and moves that the Court order a verdict of not guilty as to him on the following Counts:

Count 1
Count 2
Count 3
Count 4
Count 5
Count 6
Count 7
Count 8

And the defendant assigns as reasons therefor the following:

A. That the evidence is insufficient to warrant his convictions on said counts.

B. That much of the evidence introduced at the trial consisted of evidence obtained by means of a search seizure at the premises known as 148½ Coburn Avenue, Worcester, which search and seizure the defendant contends was illegal and in violation of the defendant's rights under U. S. Constitution, 4th Amendment and Rule 41 of the Criminal Rules of this Court. As to this ground, defendant renews its written motion earlier filed to suppress said evidence which the
[fol. 45] court denied in part and allowed in part by memorandum and order dated December 31, 1962.

C. That the indictment is defective in those respects earlier set forth in the defendant's written motions to dismiss the indictment and to strike surplusage therefrom, which motions the defendant hereby renews.

D. That the evidence is insufficient to warrant a finding

—that the defendant ever commenced or continued the business of a distiller within the meaning of the Internal Revenue Code (See Count 1, 2)

—that the defendant ever failed to make application to the Secretary of the Treasury or his delegate for the registration of a distilled spirits plant within the meaning of the Internal Revenue Code. (See Count 1).

—that the defendant ever had possession, custody or control of a distilled spirits plant within the meaning of the Internal Revenue Code.

—that the defendant ever failed to register a still or distilling apparatus with the Secretary of the Treasury or his delegate (see Count 4).

—that the defendant ever failed to receive notice of the registration of a distilled spirits plant (See Count 1)

—that the defendant ever failed to file a bond in the form prescribed (See Count 2).

—that the premises at 148½ Coburn Avenue were not bonded (See Count 5).

—that the defendant ever possessed distilled spirits in containers not stamped by stamps evidencing determination of the tax and indi-
[fol. 46] cating compliance with the provisions of the Internal Revenue Code (See Count 6).

—that the defendant ever transported, possessed, bought or sold distilled spirits.

—that the defendant ever had or possessed any liquor (See Count 7).

—that the defendant ever had or possessed any liquor intended for use in violating any provisions of Chapter 51 of sub-title E of Title 26 of the Internal Revenue Code, or regulations issued pursuant thereto. (See Count 7).

—that the defendant ever had or possessed any liquor which had been so used in violation of said Chapter 51 (See Count 7).

—that the defendant ever had a criminal intent to defraud the United States of the tax on spirits distilled by him. (See Count 3).

—that the defendant ever transported distilled spirits, or had any transported, from the Coburn Avenue premises with respect to which the tax had not been paid.

By his attorney,

/s/ MATTHEW R. MCCANN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DEFENDANT VENTRESCA'S MOTION FOR JUDGMENT OF ACQUITTAL

Criminal Case No. 62-290-C

Now comes the defendant, Ventresca, and moves that the Court order a verdict of not guilty as to him on the following grounds:

A. That the evidence is insufficient to warrant his conviction.

B. For the same reasons set forth in paragraph B of companion motion in case #62-257-C.

[fol. 47] C. For the same reasons set forth in paragraph C of companion motion in case #62-257-C.

By his attorneys,

/s/ MATTHEW R. MCCANN

Caffrey, D.J.

Mar. 22, 1963

Filed in Open Court
after argument—
Motion denied.

W. J. Lyons, Dep. Clk.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

No. CR 62-257-C

UNITED STATES OF AMERICA

v.

GIACOMO VENTRESCA

JUDGMENT—April 15, 1963

On this 15th day of April, 1963 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of failing to register a distilled spirits plant in

violation of 26 U.S.C. 2171(a), failing to file a bond in violation of 26 U.S.C. 5173(a), carrying on the business of a distiller in violation of 26 U.S.C. 5602, having in his possession and custody and under his control a still and distilling apparatus which he had failed to register in violation of 26 U.S.C. 5179(a), possessing and producing mash fit for distillation on premises other than the bonded premises of a distilled spirits plant in violation of 26 [fol. 48] U.S.C. 5222(a)(1), possessing distilled spirits in containers which were not stamped by stamps evidencing determination of the tax and indicating compliance with the provisions of the Internal Revenue Code in violation of 26 U.S.C. 5305(a)(2), possessing liquor and property intended for use in violating the Internal Revenue Code in violation of 26 U.S.C. 5686, and failing to post the sign required by 26 U.S.C. 5180(a) in violation of 26 U.S.C. 5681(a). as charged in eight (8) Cts. of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years on Count 1 thru 6 and for imprisonment for one (1) year on Count 7 and 8, said sentence to be served concurrent with that imposed in Criminal 62-290. Prison sentence to commence April 22, 1963.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ANDREW A. CAFFREY,
United States District Judge

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

[fol. 49]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CR 62-290-C

UNITED STATES OF AMERICA

v.

GIACOMO VENTRESCA

JUDGMENT—April 15, 1963

On this 15th day of April, 1963 came the attorney for the government and the defendant appeared in person and with counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of conspiracy to carry on the business of a distiller with intent to defraud the United States of the tax on spirits produced by a still in the custody, control and possession of the defendants, which still the defendants had failed to register, had failed to file application to register, for which they had failed to give bond, and which they had failed to post with signs indicating the premises were being used as a distillery, to possess mash fit for distillation, to produce spirits in a building and on premises other than on the bonded premises of a distilled spirits plant authorized by law, and to posses liquor and property intended for use in violation of the Internal Revenue Code, including distilled spirits in containers which were not stamped by stamps evidencing determination of the tax due thereon; in violation of 18 U.S.C. 371, as charged in a one (1) Ct. Indictment and the court having asked the defendant whether he has anything to

[fol. 50] say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year, concurrent with sentence imposed in Criminal 62-257. Defendant fined in the amount of $1,000.00 Prison sentence to commence April 22, 1963.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ANDREW A. CAFFREY,
United States District Judge

The Court recommends commitment to:

JOHN A. CANAVAN,
Clerk.

* * * *

[fols. 51-118] * * *

[fol. 119]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6157.

GIACOMO VENTRESCA, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From the United States District Court for the District of Massachusetts

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Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges.*

Matthew R. McCann, with whom *Maher, McCann & Talcott* was on brief, for appellant.

William J. Koen, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.—November 26, 1963.

HARTIGAN, *Circuit Judge.* The defendant, Giacomo Ventresca, appeals from a judgment of conviction of the United States District Court for the District of Massachusetts for possessing and operating an unlawful still in violation of the Internal Revenue Code and for conspiracy to do so.[1]

[1] The defendant was convicted on an eight count indictment for violation of 26 U.S.C. §§ 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, 5681(a) (1958) and on a one count indictment for violation of 18 U.S.C. § 371 (1958).

The defendant was arrested in his home on September 1, 1961 by Investigators attached to the Alcohol and To-
[fol. 120] bacco Tax Division of the Internal Revenue Service who were executing a warrant to search for an illicit still. The Investigators found and seized a still, along with other apparatus used in the distilling process and a large quantity of non-tax paid liquors. Some of the seized objects were introduced in evidence against the defendant at the trial.

Prior to trial the defendant filed a motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant. After receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257 (1960). Further, the court ruled that the facts in the affidavit constituted probable cause and the warrant described the things to be seized with sufficient particularity. Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. R. of Crim. P.

The principal question raised by the defendant is the sufficiency of an affidavit signed by one Walter A. Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in the margin.[2] It alleged in sub-
[fol. 121] stance that Mazaka had "reason to believe" that

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[2] "AFFIDAVIT FOR SEARCH WARRANT

"BEFORE W. ARTHUR GARRITY, WORCESTER, MASSACHUSETTS
"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain appa-

ratus, articles and devices, nicluding a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors, which are being held and possessed, and which have been used and are intended for use, in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602 and 5686.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"SEE ATTACHED SHEET

(s) WALTER A. MAZAKA
Investigator, Alcohol and
Tobacco Tax Div.,
Internal Revenue Service

"Sworn to before me, and subscribed in my presence, August 31st, 1961

(s) W. ARTHUR GARRITY
United States Commissioner

"Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

"On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten such bags were put into the trunk, and three were placed in the rear seat. Those in the rear seat were marked 'Domino'. The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the car with its contents was driven into the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

"On August 2, 1961, a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at 148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

"On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading

was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between the two house.

"On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

"On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the same night, the Pontiac driven by Garry with Incardone as a passenger, was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few moments. Incardone then drove away, and Garry went into his home.

"On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

"On August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

"About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car.

an illicit still and other material used in the manufacture of non-tax paid liquors were being concealed on the premises of a dwelling house located at 148½ Coburn Avenue, Worcester. On an attached sheet signed by Mazaka were recited the "facts tending to establish the foregoing ground for issuance of a Search Warrant."

The first paragraph of the attached sheet contained the following:

"Based upon observations made by me, and based upon information received officially from other In-
[fol. 122] vestigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of

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Garry opened the trunk, and then entered his house. From the trunk of the car there was removed eleven five-gallon cans which appeared to be filled. Incardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

"On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave. they met Giacomo Ventersca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that emtpy metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later, new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sound which were heard during the handling of these cans, were consistent with that of cans containing liquid.

"On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

(s) WALTER A. MAZAKA"

their observations and investigation, this request for the issuance of a search warrant is made."

There followed eleven paragraphs of stated facts, nine of which detailed the activities of two men alleged to have been seen riding around in a 1961 Pontiac automobile and making seven individual deliveries of sugar and five-gallon cans to the dwelling house at 148½ Coburn Avenue, Worcester. Two of the paragraphs recited that on three separate occasions "Investigators" smelled an odor of [fol. 123] fermenting mash in the immediate vicinity of the suspected dwelling.

The final paragraph of the attached sheet comprised this statement:

> "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."

The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon "personal knowledge and information," it is stated that such "personal knowl- [fol. 124] edge and information" was obtained from other Investigators.

The finding of probable cause as the basis for issuance of a search warrant is made by the Commissioner from the facts stated in the affidavit when that is the only evidence presented. *Siden* v. *United States*, 9 F.2d 241 (8th Cir. 1925). Such a duty cannot be delegated to the accuser. *United States* v. *Harnich*, 289 Fed. 256 (D.Conn. 1922). Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth [fol. 125] in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay.

That is not to say that an affidavit dependent upon of hearsay could not support issuance of a search warrant. The Supreme Court in *Jones* v. *United States*, *supra* at 269, has succinctly stated the law in this respect:

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented."

In *Jones*, the source of the hearsay, the informant, had direct knowledge himself of the possession of contraband articles by the suspect. He was deemed worthy of credence because he had previously given accurate information, his story was corroborated by other sources of information, and the suspect was known to the police as a narcotics user. The Court said at 271:

> "Thus we may assume that [the affiant] Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the informant's story." (Emphasis supplied).

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Where the hearsay evidence has been personally observed by federal officers and communicated directly to the affiant, courts have found a substantial basis for crediting the hearsay. In *United States* v. *McCormick*, [fol. 126] 309 F.2d 367 (7th Cir. 1962), cert. den., 372 U.S. 911 (1963)—a case the government contends "appears to be on all fours" with the instant case—the affiant had no personal knowledge of the averments in the affidavits, but each factual statement was prefaced by the declaration that the F.B.I. agents from whom the infor-

mation was received were "present" and "observed" each described event as it occurred. In *Giacona v. United States*, 257 F.2d 450 (5th Cir.), cert. den., 358 U.S. 873 (1958), the affiant was without personal knowledge but identified his informant as one W. T. Finley of the Federal Bureau of Narcotics who had personally observed the narcotics hidden under the building to be searched.

But the holdings in the aforementioned cases are inapplicable to the facts of this case. With the exception of two paragraphs in the factual recitation alleging that unidentified "Investigators" smelled the odor of fermenting mash in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through "investigation."

Thus, the affidavit leaves as a complete mystery the manner in which the Investors discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay.

Hearsay information received from an informant may be used in an affidavit to secure a search or arrest war- [fol. 127] rant only when the informant is shown to be "trustworthy," *Monnette* v. *United States*, 299 F.2d 847 (5th Cir. 1962), or "reliable," *Draper* v. *United States*, 358 U.S. 307 (1959). In *United States* v. *Pearce*, 275 F.2d 318 (7th Cir. 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient. The affiant, an F.B.I. agent, had received his information from his superior, who in turn had received it from an F.B.I. agent in Seattle, who in turn had received it from a reliable informer. The court pointed out, therefore, that the statement in the affidavit that

the affiant obtained the information from "a source which in the past has proved reliable" was obviously false. Similarly here, the affiant, Mazaka, could not truthfully vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators. The substantial basis for crediting the hearsay found in *Jones* is nowhere apparent in this case.

Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is direct or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant. See *DiBella* v. *United States*, 284 F.2d 897 (2d Cir. 1960), rev'd on procedural grounds, 369 U.S. 121 (1962). It follows that the evidence obtained as a result of such search should have been suppressed.

If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their corroboration. And [fol. 128] where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient.

Judgment will be entered vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with this opinion.

ALDRICH, *Circuit Judge*, (concurring). This is a case of general importance. As a matter of interpretation I cannot agree with the first paragraph of Judge WOODBURY'S dissent. While I do agree with the first sentence of the second paragraph, it does not lead me to his result. The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a pro forma matter. *Marron* v. *United States*, 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events

prove it was right after all. *Byars* v. *United States*, 1927, 273 U.S. 28. I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the personal observation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic coverall.

Such a principle is peculiarly appropriate here because [fol. 129] if a warrant is to be predicated primarily upon an odor, it is highly desirable that proper weighing may be made of the attendant circumstances. *Cf. Johnson* v. *United States*, 1948, 333 U.S. 10, 13.

WOODBURY, *Chief Judge*, (dissenting). In the light of the first and more particularly of the final paragraphs of the sheet attached to Mazaka's affidavit, quoted at length in footnote 2 of the opinion of the court, I would read the statements of fact contained therein as based upon "observations" made either by the affiant himself or by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Since knowledge obtained from other federal law enforcement agents, though hearsay, has sufficient verification to support the issuance of a search warrant under the rule of *Jones* v. *United States*, 362 U.S. 257 (1960), see *United States* v. *McCormick*, 309 F.2d 367 (C.A. 7, 1962), *cert. den.* 372 U.S. 911 (1963), it can make no difference which specific "observations" were made by the affiant himself and which were made by other Investigators and reported in line of duty to the affiant.

But, regardless of the foregoing, the allegations of the detection of the odor of fermenting mash emanating from Ventresca's house on three occasions, twice between four

and five o'clock on the morning of August 18, 1961, and once at about four o'clock on the morning of August 30, 1961, are clear allegations of actual observations made by Investigators themselves and not observations relayed to them by someone else whose identity does not appear. These allegations read in conjunction with the others impress me as enough to warrant issuance of the search warrant by the Commissioner. See *United States* v. *Parham*, 17 F.R.D. 301 (E.D.Mich. 1955). I would affirm.

[fol. 130]

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDGMENT ENTERED—November 26, 1963.

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court for a new trial consistent with the opinion filed this day.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY
Ch. J.

Thereafter, on December 11, 1963, mandate issued.

[fol. 131]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 132]

SUPREME COURT OF THE UNITED STATES

No. ————, October Term, 1963

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 24, 1963

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 25th, 1964.

/s/ TOM CLARK
Associate Justice of the Supreme Court of the United States

Dated this 24th day of December, 1963.

[fol. 133]

SUPREME COURT OF THE UNITED STATES

No. 782, October Term, 1963

UNITED STATES, PETITIONER

vs.

GIACOMO VENTRESCA

ORDER ALLOWING CERTIORARI.—June 22, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 740046 108

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718-986—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

GIACOMO VENTRESCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit reversing respondent's conviction for possessing and operating an illegal distillery and for conspiracy to do so.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 10–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, p. 22) was entered on November 26, 1963. The time to file a petition for a writ of certiorari was extended by order of Mr. Justice Clark, dated December 24, 1963, to and including January 25, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In an affidavit for a search warrant which on its face showed that Investigators of the Alcohol and Tobacco Tax Division had conducted a month-long investigation and had made personal observations of many suspicious circumstances, the affiant stated at the outset that his belief that the house contained a still was based upon personal observations, information received from other Investigators of the Division, "and reports orally made to me describing the results of their observations and investigation". The court below held that the use of the word "investigation" indicated that the information set forth in the affidavit, or some of it, might have come from informants of unknown reliability (even though this inference is negated by the concluding sentence of the affidavit) and that therefore the affidavit did not show probable cause. The question presented is whether this technical and restrictive reading of the affidavit constitutes such a misapprehension of the judical function in reviewing the sufficiency of an affidavit for a search warrant, contrary to the views of other circuits, as to call for corrective action by this Court.

STATEMENT

Petitioner's conviction in the United States District Court for Massachusetts for possessing and operating an illegal distillery was reversed by the Court of Appeals for the First Circuit (one judge dissenting) on the ground that the affidavit for a search warrant, pursuant to which the still was found, was insufficient to establish probable cause. The affidavit is repro-

duced in full in the opinion of the court of appeals (App. *infra*, pp. 11–15).

The affidavit was made and submitted to a Commissioner on August 31, 1961, by Walter Masaka, an Investigator for the Alcohol and Tobacco Tax Division. He stated that he had reason to believe that an illegal distillery was in operation on Ventresca's premises at 148½ Coburn Avenue in Worcester, Massachusetts. The grounds for belief were set forth in a sheet attached to the affidavit. The sheet begins with the statement:

> Based upon observations made by me and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

The affidavit then sets forth seven different occasions, at specific times on specific dates between July 28 and August 30, 1961, when a Pontiac car owned by one Garry, with Garry driving and one Incardone as a passenger, was seen to have been driven into the yard at the rear of the premises in question, either heavily laden (August 7, 1961) or with identified loads of sugar (July 28, August 7, August 16, August 24) or tin cans (August 11, August 28). On some dates (July 28, August 7, August 11) it was reported that Garry and Incardone had been seen loading Garry's car. It was also reported that on August 16 and August 24, at about midnight, Garry was seen to arrive at the place where he lived and remove five-

gallon cans from the trunk of his car; and that Incardone made a number of trips to carry the cans into Garry's home, two at a time. On August 28, after Garry and Incardone had delivered empty cans to Ventresca's premises, other cans were placed in the trunk of Garry's car. The affidavit states that the "manner in which the cans were handled, and the sounds which were heard during the handling of these cans, were consistent with that of cans containing liquid." The persons making these various observations were not specified.

The affidavit contains two additional paragraphs alleging that on specified dates, August 18 and August 30, "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of the premises at 148 Coburn Avenue. As to August 30, it was reported that "they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue."

The sheet concludes:

> The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

The district court upheld the validity of the warrant on a motion to suppress. The court of appeals held the warrant insufficient because the affiant's belief was based in part on reports of other Investigators' observations and *investigation*. From use of the term "investigation", the court inferred that the

observations described in the seven paragraphs summarized above might have been made by informants of unknown reliability, and that:

> With the exception of two paragraphs in the factual recitation alleging that unidentified "Investigators" smelled the odor of fermenting mash in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through investigation. [App., p. 18.]

Because the affiant could not vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators and described under the generic term "investigation", the court of appeals found no substantial basis for crediting whatever information may have been hearsay, and concluded that under *Jones* v. *United States,* 362 U.S. 257, probable cause had not been established.

REASONS FOR GRANTING THE WRIT

The Solicitor General seeks certiorari in this small and intrinsically unimportant case because of a conviction that upholding the activities of law-enforcement agencies which have scrupulously observed the established procedure for safeguarding constitutional rights and satisfying the substantial requirements for a search warrant is no less important to the administration of justice than the invalidation of convictions because of disregard for individual rights or official overreaching. By an unduly technical and clearly erroneous interpretation of the affidavit upon which the search warrant was issued, the decision

below defeats substantial justice in the conduct of a criminal proceeding.

1. On any fair reading, it is plain that the affidavit cannot be said to embody unreliable hearsay. It is true that the affiant in his initial statement referred to his personal observations and the results of "observations and investigation" by his fellow officers. However, his concluding statement was that the information was based "upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." The term "Investigators" means only regular full time government employees. When the two statements are read in conjunction with the detailed specifications of time and place and the other detailed allegations showing that the same car was observed at different locations and sometimes followed, there can be no doubt that the affidavit reflected the personal observations of a number of Investigators of the Division, rather than observations made by unknown informants. Moreover, even if it could be assumed (which we dispute) that some of the detailed observations recounted in the affidavit could fairly be regarded as having come from persons other than investigators, we submit that information given with the kind of specificity shown in this affidavit would be entitled to credence. This is particularly true when the information is corroborated by observations which are indisputably those of the government's investigators (see point 2, *infra*). Certainly, it has never been the rule that a affidavit supporting a search warrant—a docu-

must normally prepared by a non-lawyer—is to be read like a common law pleading or that a determination of probable cause is to be made in disregard of the practicalities of everyday living and of law enforcement.

2. The warrant is independently sustained by the allegations that the government's investigators smelled the odor of fermenting mash on two occasions and heard the noise of machinery emanating from petitioner's residence. To conclude in such circumstances that the affidavit was defective is to reach a result in direct conflict with *Monnette* v. *United States*, 299 F. 2d 847 (C.A. 5), which held that the distinctive odor of fermenting mash is alone sufficient to justify issuance of a warrant to search a dwelling.[1]

[1] To the extent (as suggested in the concurring opinion below) that the decision holds that the affidavit will fall if any of its averments are insufficient to support the warrant, it conflicts with decisions in other circuits. There is clear authority in the Fifth and Ninth Circuits that if an affidavit contain *any* facts sufficient to establish probable cause, the warrant should be upheld. *Clay* v. *United States*, 246 F. 2d 298 (C.A. 5, 1957); *Chin Kay* v. *United States*, 311 F. 2d 317 (C.A. 9, 1962). Even assuming that some or even all of the seven paragraphs setting forth observations made by persons not specifically identified as "Investigators" may contain information received from unofficial informants, this fact would not invalidate the warrant if the affidavit recites other facts establishing probable cause. Here the allegations deemed unsatisfactory failed to justify the warrant, in the view of the majority below, only because of its construction of the words "and investigation." Surely the presence of an ambiguity in parts of an affidavit is not sufficient reason for refusing to consider the remainder.

718-000—64——2

Two decisions of this Court also indicate that such a suspicious odor traced to a residence will support issuance of a warrant. *Johnson* v. *United States*, 333 U.S. 10 (odor of narcotics); *Chapman* v. *United States*, 365 U.S. 610 (odor of mash). Notably, those decisions condemned hasty action by officers who invaded premises immediately on the basis of telltale odors, indicating that the proper course was to obtain a search warrant. That is precisely what the officers did in the instant case. Here, the investigators did not act hastily; they conducted a lengthy and thorough investigation; they procured a search warrant on the basis of detailed allegations. Nonetheless, this conviction has been set at naught.

CONCLUSION

Despite the apparent conflict among the circuits, we find the need for review not in any question of legal doctrine but in the importance of making it plain that the activities of law-enforcement officials are not to be invalidated by hypertechnical requirements where they have carefully followed the constitutional and statutory procedure for conducting a search and have scrupulously observed every substantial right of the persons suspected. The Court has been alert to invalidate improper searches and seizures and has often stressed the importance of obtaining a search warrant. Such decisions not only protect individual liberty but strengthen the administration of justice by promoting respect for law on the part of law-enforcement officers. The other side of that

coin is the need for emphasizing substantial justice when law-enforcement officers conscientiously follow the proper course. Cavilling over the meaning of a single word when the sense is plain, or disregarding allegations which fully justify the warrant because others, taken alone, are arguably insufficient, gives rise to a sense of frustration and, more importantly, derogates from the goal of building a system of law enforcement sensitive both to the needs of the community and the demands of individual liberty.

This petition for a writ of certiorari should accordingly be granted.

Respectfully submitted.

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JANUARY 1964.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 6157

GIACOMO VENTRESCA, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

Before WOODBURY, *Chief Judge,* and HARTIGAN and ALDRICH, *Circuit Judges*

Opinion of the Court

November 26, 1963

HARTIGAN, *Circuit Judge.* The defendant, Giacomo Ventresca, appeals from a judgment of conviction of the United States District Court for the District of Massachusetts for possessing and operating an unlawful still in violation of the Internal Revenue Code and for conspiracy to do so.[1]

The defendant was arrested in his home on September 1, 1961 by Investigators attached to the Alco-

[1] The defendant was convicted on an eight count indictment for violation of 26 U.S.C. §§ 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, 5681(a) (1958) and on a one count indictment for violation of 18 U.S.C. § 371 (1958).

hol and Tobacco Tax Division of the Internal Revenue Service who were executing a warrant to search for an illicit still. The Investigators found and seized a still, along with other apparatus used in the distilling process and a large quantity of non-tax paid liquors. Some of the seized objects were introduced in evidence against the defendant at the trial.

Prior to trial the defendant filed a motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant. After receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States,* 362 U.S. 257 (1960). Further, the court ruled that the facts in the affidavit constituted probable cause and the warrant described the things to be seized with sufficient particularity. Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. R. of Crim. P.

The principal question raised by the defendant is the sufficiency of an affidavit signed by one Walter A. Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in the margin.[2] It alleged in substance that Mazaka had "reason to believe" that

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[2] "AFFIDAVIT FOR SEARCH WARRANT

"BEFORE W. ARTHUR GARRITY, WORCESTER, MASSACHUSETTS

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as a one-family light green wooden frame dwelling house

an illicit still and other material used in the manufacture of non-tax paid liquors were being concealed on the premises of a dwelling house located at 148½ Coburn Avenue, Worcester. On an attached sheet

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located at 148½ Coburn Avenue, Worcester, occupied by Giacomo Ventresca and his family, together with all approaches and appurtenances thereto, in the District of Massachusetts, there is now being concealed certain property, namely an unknown quantity of material and certain apparatus, articles and devices, including a still and distilling apparatus setup with all attachments thereto, together with an unknown quantity of mash, an unknown quantity of distilled spirits, and other material used in the manufacture of non-tax-paid liquors, which are being held and possessed, and which have been used and are intended for use in the distillation, manufacture, possession, and distribution of non-tax-paid liquors, in violation of the provisions of 26 USC 5171(a), 5173, 5178, 5179(a), 5222(a), 5602, and 5686.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"See Attached Sheet

(s) Walter A. Mazaka
Investigator, Alcohol and
Tobacco Tax Div.,
Internal Revenue Service

"Sworn to before me, and subscribed in my presence, August 31st, 1961

(s) W. Arthur Garrity
United States Commissioner

"Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

"On or about July 28, 1961, about 6:45 P.M., an observation was made covering a Pontiac automobile owned by one Joseph Garry. Garry and one Joseph Incardone put thirteen bags of sugar into the car. These bags of sugar weighed sixty pounds each. Ten bags were put into the trunk, and three

signed by Mazaka were recited the "facts tending to establish the foregoing ground for issuance of a Search Warrant."

'were placed in the rear seat. Those in the rear seat were marked 'Domino.' The others appeared to have similar markings. After the sugar was loaded into the car, Garry together with Incardone drove it to the vicinity of 148 Coburn Avenue, Worcester, Massachusetts, where the car was parked. Sometime later, the car with its contents was driven in the yard to the rear of 148 and between the premises 148 and 148½ Coburn Avenue. After remaining there about twenty-five minutes, the same two men drove in the direction of Boston.

"On August 2, 1961 a Pontiac car owned by Garry, and driven by Garry with Incardone as a passenger, was followed from Boston to Worcester. The car appeared heavily laden. The car was again driven into the driveway at 148 and 148½ Coburn Avenue to the rear of the yard and between the above-numbered houses.

"On August 7, 1961 at least six sixty-pound bags of Domino Sugar were loaded into the Pontiac owned by Garry. The loading was done by Garry and Incardone. The car traveled from Boston to Worcester, then to Holden, and returned with its contents and entered the driveway at 148 and 148½ Coburn Avenue, where the car was parked at the rear between the two houses.

"On August 11, 1961 new empty metal or tin cans were transferred from a car owned by Incardone to the Pontiac owned by Garry on Highland Street in Hyde Park. The Pontiac was driven by Garry with Incardone as a passenger to Worcester, and into the yard at 148 and 148½ Coburn Avenue to the rear and between the two numbered premises.

"On August 16, 1961 the Pontiac was observed. In the back seat bags of sugar were observed covered with a cloth or tarpaulin. A sixty-pound bag of sugar was on the front seat. Garry was observed after loading the above-described sugar into the car placing a carton with various five-pound bags of sugar on the top of the tarpaulin. The car was then driven by Garry with Incardone as a passenger to Worcester together with its contents into the yard at 148 and 148½ Coburn Avenue to the rear of and between the two houses. About Midnight on the

The first paragraph of the attached sheet contained the following:

"Based upon observations made by me, and based upon information received officially from

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same night, the Pontiac driven by Garry with Incardone as a passenger was seen pulling up to the premises at 59 Highland Street, Hyde Park, where Garry lives. Garry opened the trunk of his car, and removed ten five-gallon cans therefrom, and placed them on the sidewalk. He then entered the house, and opened a door on the side. Incardone made five trips from the sidewalk to the side of the house carrying two five-gallon cans on each such trip. It appeared that the cans were filled. On each of these trips, Incardone passed the two cans to someone standing in the doorway. Immediately after the fifth such trip, Garry came out of the door and joined Incardone. They walked to the sidewalk, and talked for a few moments. Incardone then drove away, and Garry went into his home.

"On August 18, 1961 Investigators smelled an odor of fermenting mash on two occasions between 4:00 A.M. and 5:00 A.M. The first such odor was detected as they walked along the sidewalk in front of 148 Coburn Avenue, and the second such odor was detected from the side of 148 Coburn Avenue. At or about the same time, the Investigators heard certain metallic noises which cannot be further identified by source or sound.

"An August 24, 1961 the Pontiac was observed parked at a bowling alley and coffee shop off Route 9. The back of the car contained what appeared to be boxes covered by a cloth or tarpaulin, but which cannot be more specifically identified. On the front seat of the car was observed a sixty-pound bag of Revere Sugar. Garry and Incardone were observed in the restaurant or coffee shop eating. Later the car was seen driven to the rear of 148 between 148 and 148½ Coburn Avenue, Worcester.

"About Midnight the Pontiac was observed pulling up in front of Garry's house at 59 Highland Street, Hyde Park. Garry was driving, and Incardone was a passenger. They both got out of the car. Garry opened the trunk, and then entered his house. From the trunk of the car there was removed eleven five-gallon cans which appeared to be filled. In-

other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made."

There followed eleven paragraphs of stated facts, nine of which detailed the activities of two men alleged to have been seen riding around in a 1961 Pontiac auto-

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cardone made six trips to a door on the side of the house. He carried two five-gallon cans on each trip, except the sixth trip. On that trip he carried one can, having passed the others to somebody in the doorway, and on the last trip he entered the house. He remained there at least forty-five minutes, and was not observed to leave.

"On August 28, 1961 Garry drove Incardone in his car to Worcester. On Lake Ave., they met Giacomo Ventresca, who lives at 148½ Coburn Avenue, Worcester. Ventresca entered the car driven by Garry. The car was then driven into the yard to the rear of 148 and between 148 and 148½ Coburn Avenue. An observation was made that empty metal cans, five-gallon size, were being taken from the car owned by Garry, and brought into the premises at 148½ Coburn Avenue, which was occupied by Ventresca. Later, new cans similar in size, shape and appearance were observed being placed into the trunk of Garry's car while parked at the rear of 148 and in front of 148½ Coburn Avenue. The manner in which the cans were handled, and the sounds which were heard during the handling of these cans, were consistent with that of cans containing liquid.

"On August 30, 1961, at about 4:00 A.M., an odor of fermenting mash was detected while Investigators were walking on the sidewalk in front of 148 Coburn Avenue. At the same time, they heard sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue.

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

(s) WALTER A. MAZAKA"

mobile and making seven individual deliveries of sugar and five-gallon cans to the dwelling house at 148½ Coburn Avenue, Worcester. Two of the paragraphs recited that on three separate occasions "Investigators" smelled an odor of fermenting mash in the immediate vicinity of the suspected dwelling.

The final paragraph of the attached sheet comprised this statement:

> "The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation."

The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon "personal knowledge and information," it is stated that such "personal knowledge and information" was obtained from other Investigators.

The finding of probable cause as the basis for issuance of a search warrant is made by the Commissioner from the facts stated in the affidavit when that is the only evidence presented. *Siden* v. *United States,* 9 F. 2d 241 (8th Cir. 1925). Such a duty cannot be delegated to the accuser. *United States* v. *Harnich,* 289 Fed. 256 (D.Conn. 1922). Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay.

That is not to say that an affidavit dependent upon of hearsay could not support issuance of a search warrant. The Supreme Court in *Jones* v. *United States, supra* at 269, has succinctly stated the law in this respect:

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, so long as a substantial basis for crediting the hearsay is presented."

In *Jones,* the source of the hearsay, the informant, had direct knowledge himself of the possession of contraband articles by the suspect. He was deemed worthy of credence because he had previously given accurate information, his story was corroborated by other sources of information, and the suspect was known to the police as a narcotics user. The Court said at 271:

> "Thus we may assume that [the affiant] Didone had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the informant's story." (Emphasis supplied).

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Where the hearsay evidence has been personally observed by federal officers and communicated directly to the affiant, courts have found a substantial basis for crediting the hearsay. In *United States* v. *McCor-*

mick, 309 F. 2d 367 (7th Cir. 1962), cert. den., 372 U.S. 911 (1963)—a case the government contends "appears to be on all fours" with the instant case—the affiant had no personal knowledge of the averments in the affidavit, but each factual statement was prefaced by the declaration that the F.B.I. agents from whom the information was received were "present" and "observed" each described event as it occurred. In *Giacona* v. *United States,* 257 F. 2d 450 (5th Cir.), cert. den., 358 U.S. 837 (1958), the affiant was without personal knowledge but identified his informant as one W. T. Finley of the Federal Bureau of Narcotics who had personally observed the narcotics hidden under the building to be searched.

But the holdings in the aforementioned cases are inapplicable to the facts of this case. With the exception of two paragraphs in the factual recitation *alleging that unidentified "Investigators" smelled the odor of fermenting mash* in the vicinity of the suspected dwelling, all we learn from Mazaka's affidavit is that the investigators received their information through "investigation."

Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit

alone, but the distinct possibility of hearsay-upon-hearsay.

Hearsay information received from an informant may be used in an affidavit to secure a search or arrest warrant only when the informant is shown to be "trustworthy," *Monnette* v. *United States,* 299 F. 2d 847 (5th Cir. 1962), or "reliable," *Draper* v. *United States,* 358 U.S. 307 (1959). In *United States* v. *Pearce,* 275 F.2d 318 (7th Cir. 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient. The affiant, an F.B.I. agent, had received his information from his superior, who in turn had received it from an F.B.I. agent in Seattle, who in turn had received it from a reliable informer. The court pointed out, therefore, that the statement in the affidavit that the affiant obtained the information from "a source which in the past has proved reliable" was obviously false. Similarly here, the affiant, Mazaka, could not truthfully vouch for the reliability or trustworthiness of the sources of information that might have been used by the Investigators. The substantial basis for crediting the hearsay found in *Jones* is nowhere apparent in this case.

Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is direct or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant. See *DiBella* v. *United States,* 284 F.2d 897 (2d Cir. 1960), rev'd on procedural grounds, 369 U.S. 121 (1962). It follows that the evidence obtained as a result of such search should have been suppressed.

If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their corroboration. And where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient.

Judgment will be entered vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with this opinion.

ALDRICH, *Circuit Judge,* (concurring). This is a case of *general importance.* As a matter of interpretation I cannot agree with the first paragraph of Judge WOODBURY'S dissent. While I do agree with the first sentence of the second paragraph, it does not lead me to his result. The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a pro forma matter. *Marron* v. *United States,* 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events prove it was right after all. *Byars* v. *United States,* 1927, 273 U.S. 28. I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the

personal observation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic coverall.

Such a prinicple is peculiarly appropriate here because if a warrant is to be predicated primarily upon an odor, it is highly desirable that proper weighing may be made of the attendant circumstances. *Cf. Johnson* v. *United States,* 1948, 333 U.S. 10, 13.

WOODBURY, *Chief Judge* (dissenting). In the light of the first and more particularly of the final paragraphs of the sheet attached to Mazaka's affidavit, quoted at length in footnote 2 of the opinion of the court, I would read the statements of fact contained therein as based upon "observations" made either by the affiant himself or by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. Since knowledge obtained from other federal law enforcement agents, though hearsay, has sufficient verification to support the issuance of a search warrant under the rule of *Jones* v. *United States,* 362 U.S. 257 (1960), see *United States* v. *McCormick,* 309 F. 2d 367 (C.A. 7, 1962), *cert. den.* 372 U.S. 911 (1963), it can make no difference which specific "observations" were made by the affiant himself and which were made by other Investigators and reported in line of duty to the affiant.

But, regardless of the foregoing, the allegations of the detection of the odor of fermenting mash emanating from Ventresca's house on three occasions, twice between four and five o'clock on the morning of August 18, 1961, and once at about four o'clock on the morning of August 30, 1961, are clear allegations of actual observations made by Investigators

themselves and not observations relayed to them by someone else whose identity does not appear. These allegations read in conjunction with the others impress me as enough to warrant issuance of the search warrant by the Commissioner. See *United States* v. *Parham*, 17 F.R.D. 301 (E.D.Mich. 1955). I would affirm.

JUDGMENT

November 26, 1963

This cause came on to be heard on consolidated appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, the verdict is set aside, and the case is remanded to that Court for a new trial consistent with the opinion filed this day.

By the Court:

/S/ ROGER A. STINCHFIELD.

Approved:

/S/ PETER WOODBURY

Ch. J.

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No. 28

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

RESPONDENT'S BRIEF IN OPPOSITION TO SOLICITOR GENERAL'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 782

UNITED STATES OF AMERICA, PETITIONER

vs.

GIACOMO VENTRESCA

RESPONDENT'S BRIEF IN OPPOSITION TO SOLICITOR GENERAL'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

The Solicitor General, has asked that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit reversing respondent's conviction for possessing and operating an illegal distillery and for conspiracy to do so.

The opinion of the court of appeals is set forth in the Appendix to the Government's Petition (pp. 10-22).[1]

The facts, well summarized in the decision of the Court below, indicate that the respondent Ventresca was arrested in his home on September 1, 1961 following a search and seizure by government investigators attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service; that prior to trial the defendant filed a

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[1] References herein to the Government's Petition for a Writ of Certiorari will be shown as "Pet. for W/C".

motion for the return of seized property and the suppression of evidence obtained through the execution of the search warrant; and that after receiving evidence on the motion, the district court ruled that the affidavit was sufficient under the test promulgated by the Supreme Court in *Jones* v. *United States*, 362 U.S. 257 (1960). Ordered suppressed as evidence, however, were a telephone book, desk directory and various papers taken from a box on Ventresca's bedroom bureau and from his trouser pocket on the ground that they were mere evidence and, therefore, not within the provision of Rule 41(b)(2) of the Fed. Rules of Criminal Procedure.

The principal question raised by the respondent in the district court and again in the court of appeals was the sufficiency of an affidavit signed by one Mazaka, an Investigator attached to the Alcohol and Tobacco Tax Division of the Internal Revenue Service, which affidavit was the sole evidence upon which the search warrant was issued.

The affidavit is set out in full in footnote #2 of the Circuit Court decision (Pet. for W/C pp. 11-15).

The First Circuit, in reversing respondent's conviction, held that the affidavit was inadequate and that all evidence obtained pursuant thereto should have been suppressed.

ARGUMENT

1. Reasons Advanced by Petitioner In Support of Its Position

The Solicitor General's petition prays that certiorari be granted for what appear to be two reasons: first, that the decision below stemmed from "an unduly technical and clearly erroneous interpretation of the affidavit upon which the search warrant was issued" (Pet. for W/C, pp. 5-6) in that it rejected hearsay evidence of government in-

vestigators; and second, that it was in conflict with other federal decisions which validate warrants issued solely on an affidavit as to odor or noise emanating from the premises (Pet. for W/C pp. 7-8).

In so arguing, the government has leaped to the conclusion that the matters allegedly relayed to the affiant by the government investigators were, as to the latter, matters of personal knowledge. But the affidavit did not so show, and the court of appeals declined to so assume.

Further, although some decisions have approved search warrants on a representation under oath that the affiant detected an odor of mash or narcotics as the case may be, this is not to say that every affidavit based on odor should qualify, particularly those based on hearsay.

2. This Is Not A Case for 'Certiorari'

The respondent does not think that either of the two reasons advanced by the government are well founded. Subsequent portions of this brief will cover these two points in more detail.

Suffice to say, the respondent does not regard the decision below as in conflict with other federal decisions, nor does he agree with petitioner's contention that it was unduly technical, legalistic, evasive, subtle, or that it 'caviled' over the meaning of a single word. The decision was basic, clear, and unambiguous.

The Solicitor General apparently hopes that by calling the lower court names he can tease this court into granting certiorari and thereby get a second shot at the issues of law involved. But the degree of madness or frustration on the part of the government's attorneys is not the test. There is no need or justification for a Writ of Certiorari.

3. The Affidavit Was Plainly Insufficient

A. *The test*

Ordinarily an affidavit is a statement of fact by a person under oath as to matters of personal knowledge. Otherwise, it is difficult to comprehend how an oath can safely be taken. This does not rule out, however, the possibility of an affidavit based wholly or partly on hearsay.

In *Jones* v. *United States*, 362 U.S. 257 (1960) the Court said (p. 269):

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is presented.*" (underscoring supplied)

The rules of the *Jones case* has not been interpreted as an unqualified acceptance of hearsay affidavits. Something more must be shown. In *United States* v. *Ramirez*, 279 F. 2d 712, 715 (C.A. 2, 1960) appears the following:

> "*Jones* v. *U.S.* . . . has now established that an affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for under Jones, the affiant must not only believe the hearsay report but in all likelihood the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. *In addition Jones may require that the affidavit include some factual information independently corrobative of the hearsay report*". (underscoring supplied).

B. *The affidavit was total hearsay*

In the first paragraph of the affidavit the affiant stated that it was ". . . based on observations made by me and . . . upon information received officially from other Investigators . . ." In the last paragraph, the affiant stated, somewhat inconsistently that it was ". . . . based upon personal knowledge and information which has been obtained from Investigators . . ." It could well be that the only fact personally known to the affiant was the defendant's address. Confronted with this situation, the court of appeals said:

> "The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon 'personal knowledge and information,' it is stated that such 'personal knowledge and information' was obtained from other Investigators."
>
> "Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay". (Pet. for W/C p. 16).

C. *The source and reliability of the hearsay was not established.*

Not only were the so-called government investigators nameless and faceless, the affidavit gave no assurance that the matters reported to the affiant by the so-called investigators were observed by them. At the most we have an affidavit by the affiant that he heard something from investigators who themselves had come upon the informa-

tion in the course of an investigation. As to this, the court of appeals said:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (Pet. for W/C p. 18-19).

A similar holding on a somewhat similar set of facts is found in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2, 1960) (appeal later dismissed on procedural grounds, 369 U.S. 121). It was held that an arrest warrant had issued illegally on the basis of an insufficient complaint (seizure of goods sustained on other grounds). The complaint contained language very much like the affidavit in the instant case, to wit:

> "That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samual Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

In striking down the warrant for arrest, the Court said (at p. 900):

> "It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been

committed was grounded on his 'personal observations in this case, the statements of Samuel Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics' but what other sources could there possibly be? Such a shotgun, all encompassing, enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless other witnesses or the unidentified reports and records. The complaint is no better than that in *Giordenello* v. *United States*, and the warrant is invalid for the same reasons."

Assuming for the sake of argument that there was no hearsay upon hearsay and that those who reported the facts to the affiant observed them first hand, the affiant still did not identify the sources of his information other than to say it came from investigators. This deficiency is not always fatal, as in cases where there is other substantiation for crediting the hearsay, but where there is nothing but the hearsay as defendant contends is the case here, it becomes necessary to know something about the person or persons on whom the affiant has relied.

Although he says he received his information from investigators attached to the Alcohol and Tobacco Tax Division, he does not identify them by name or other description. He assumes a judicial finding as to their reliability without judicial strain. Nothing is said as to who they were, whether full time or 'ad hoc' employees, whether new or old in the service, whether well known to the affiant or not, whether attached to the same division as the affiant or not, or whether found to be reliable in the past or not. His form of affidavit necessitates a judicial determination that the hearsay of these individuals owes its substantial basis for credibility to the mere fact that these people are employees of the government as-

signed, in this case, to the same type of work as is the affiant.

D. *The petitioner has misinterpreted portions of the affidavit.*

In that portion of the Government's petition entitled "Question Presented", two statements are made which the respondent says are incorrect. One, the petition claims that the affidavit said that the "Investigators of the Alcohol and Tobacco Tax Division" made "personal" observations. The affidavit did not state that their observations were "personal" and therein lay the problem. True in one instance the affiant said the affidavit was "based upon personal knowledge and information . . . obtained from" others (Pet. for W/C, ftn. p. 15), but this is a contradiction in terms.

Two, the petition states that an inference was drawn by the court below that information obtained from investigation may have included unreliable as well as reliable data, but that this inference was negated by the concluding sentence of the affidavit. The respondent fails to see how said concluding sentence negates the inference. Rather it supports it, for to say that the information was obtained from investigators doesn't show where they got it.

The petition states that even though some of the detailed observations in the affidavit could be regarded as having come from persons other than (government) investigators, information given with this kind of 'specificity' would be entitled to credence (Pet. for W/C p. 6). This is a novel proposition. It would dispense with the need of verification in any case where the yarn appears well spun. It suggests that the truth of the facts depends on how true they appear to be, and that if they clearly appear to be true, they must be true.

The petition (p. 6) says "there can be no doubt that the affidavit relected the personal observations of a number of investigators of the Division rather than observations made by unknown informants." But it was precisely this doubt on which the decision of the lower court turned.

E. *The affidavit was anonymous*

The rights of a property owner, not yet a defendant in any criminal action, are not to be lightly regarded. The authorities are replete with historical explanations as to why the Fourth Amendment was phrased in such rigid language. See *Henry* v. *United States*, 361 U.S. 98 (1959). It takes little imagination to picture what must have been the state of mind of the delegates to the constitutional convention in the formative years of this country. These men are still seared with the scars of a revolutionary war against their mother country begun in 1775 at great personal peril and risk to themselves. The indignities they had suffered under colonial rule had pushed them to the breaking point. It was to throw off tyranny in all forms that the war had been conceived, not only the tyranny of peremptory search and seizure, but that of involuntary quartering and feeding of troops, of a subjugated press, of insufficient home rule, and the like.

In drawing up the Fourth Amendment, one thing was to be certain. No one's home was to be invaded in the name of law or government unless some individual was prepared to accept full responsibility by going before a proper magistrate and swearing under oath as to the existence of facts sufficient to constitute probable cause.

How chagrined would be the government if after a brutal entry the search should turn up nothing, then to find that the individual responsible for the whole matter had relied solely on what others had told him and knew nothing about it himself.

In the instant case the affiant could well know nothing, and those on whom he relied for information, being unnamed and unnumbered, could hardly be brought to account. The affidavit was anonymous. For all that the U.S. Commissioner would know the affidavit could well have been drawn by a swivel-chair government bureau head from the collective contents of his office files.

The respondent contends that this was not what was contemplated by the framers of the Fourth Amendment.

True, a defendant can understand the reluctance of a governmental agency to disclose in advance of trial the names and identities of the parties to utter testimony against him. Nowhere in this case, either in the affidavit supporting the search warrant or in the recitation of overt acts supporting the conspiracy indictment, is there any indication as to where or from whom the government obtained its information leading to the issuance of the search warrant.

The defendant of course does not know whether the affidavit was loosely and sloppily drawn, or whether it was artfully drawn for the purpose of keeping the defendant uninformed until the date of trial. But the competitive aspects of trial practice with its attendant strategies on both sides should not be permitted to minimize the government's responsibilities in the pre-trial stages of search and seizure.

4. The Decision Below Was Not In Conflict With Other Federal Courts

The government's petition (pp. 7-8) says that "to conclude . . . that the affidavit was defective is to reach a result in direct conflict with *Monette* v. *United States*, 299 F. 2d 847 (C.A. 5, 1962), which held that the distinctive odor of fermenting mash is alone sufficient to justify issuance of a warrant to search a dwelling." On the same point the petitioner also cites *Johnson* v. *United States*,

333 U.S. 10 and *Chapman* v. *United States*, 365 U.S. 610 (Pet. for W/C pp. 7-8).

The respondent has read the cases and does not agree.

In the *Monette case*, supra, the affiant (Norman R. Hilledge) stated that he was "an enforcement agent with the Florida State Beverage Department" and that *he* "distinctly smelled the odor of fermenting mash emanating from the premises". (Affidavit set out in footnote #3 of decision on p. 849). In other words, the person alleged to have smelled the odor was identified as the affiant. In the case at bar the investigators alleged to have smelled the odors or heard the noises were not shown to include the affiant, nor were they even referred to by name.

In the *Johnson case*, supra, a search of premises was held invalid for failure of the officers to first obtain a search warrant. The Court did hold with certain qualifications, that mere evidence of odors would be sufficient to justify issuance of a search warrant. The Court said:

> "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."

But this of course did not pass upon the question of a hearsay affidavit. And the court in the *Johnson case*, had before it for consideration a set of facts in which the party detecting the odor was an unnamed and faceless investigator.

In the *Chapman case*, supra, the Court's attention was focused upon the problem of a search without a warrant after government officers detected an odor of mash. Although the Court held the officers should have sought a warrant, the case cannot be cited as an authority that

the smell of mash is enough in itself, for there was neither decision nor distinction on this point.

The more logical position on this issue would seem to be the one taken by Judge Aldrich of the First Circuit, that given an affidavit which fails to satisfy the most fundamental requirements of the Fourth Amendment when viewed as a whole, it serves no good purpose to knit-pick through its contents in search of an iota or two which might conceivably sustain it.

In the footnote on p. 7 of the petition, the Solicitor General says that Judge Aldrich's concurring opinion suggests that "the affidavit will fall if any of its averments are insufficient to support the warrant", and the Solicitor then cites cases to disprove this point. Obviously, Judge Aldrich suggested no such thing. His concern was not with the "barrow-load" of allegations that may be insufficient, but with the value and the strength, if at all, of those allegations that would in some instances be sufficient.

Conclusion

In his Conclusion (Pet. for W/C pp. 8-9) the Solicitor General complains that he is being asked to comply with "hypertechnical requirements", and he has charged the court below with "cavilling over the meaning of a single word when the sense is plain".

The respondent does not view the problem that simply. Although the Government has its fair share of earthly burdens, so too the people have theirs. And the purpose and intent of the Fourth Amendment should not be watered down or put in jeopardy by affidavits that either do not meet the test, or which do meet the test but fail to show that they do, lest individuals be deprived of the security and privacy of their homes and eventually their personal liberty.

This was no wishy-washy decision. The majority opinion of Judge Hartigan rings clear in unequivocal language. And so confident was Judge Aldrich of the rightness of his vote, that he filed a concurring opinion for the purpose of taking issue with the dissent of Judge Woodbury.

It is not adequate reason for a Writ of Certiorari to say that the lower court should have overlooked the deficiencies of the affidavit, but did not, and that the Supreme Court of the land should now do so.

The petition for a Writ of Certiorari should be denied.

GIACOMO VENTRESCA

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 28

UNITED STATES OF AMERICA, PETITIONER

v.

GIACOMO VENTRESCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 28–38) is reported at 324 F. 2d 864. The opinions of the district court denying the motions to suppress (R. 15–18, 18–19) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1963 (R. 38). By order of Mr. Justice Clark, dated December 24, 1963, the time for filing a petition for a writ of certiorari was extended to and including January 25, 1964 (R. 39). The petition for a writ of certiorari was filed on January 23, 1964, and granted on June 22, 1964 (R. 40). The

jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTION PRESENTED

An affidavit for a search warrant, sworn to by an Investigator of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, contained a detailed recital of facts establishing probable cause to believe that an illegal still was being operated on certain premises. The introductory paragraph of the affidavit stated that the affiant's information was "[b]ased upon observations made by me, * * * information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation * * *." The concluding paragraph of the affidavit further stated that the recited information was "based upon personal knowledge and information which has been obtained from Investigators of the * * * Division * * * who have been assigned to this investigation." Relying on the quoted language, the court below held (1) that all of the information recited in the affidavit may have been gathered by Investigators other than the affiant and may thus have been hearsay, and (2) that such information may in turn have been gathered entirely by unreliable informants. On the basis of the conclusion that the entire affidavit may thus have been based upon unreliable hearsay, the court held that probable cause for the issuance of a warrant had not been established.

The question presented in whether the affidavit did, in fact, establish probable cause.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located. * * *
>
> (b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property
>
> * * * * *
>
> (2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *
>
> * * * * *
>
> (c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming

or describing the person or place to be searched. * * *

* * * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the groud that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * *.

* * * * *

STATEMENT

Respondent was tried by a jury in the United States District Court for the District of Massachusetts under indictments charging him with possession and operation of an illegal distillery [1] and conspiracy.[2] He was convicted on all counts and sentenced to imprisonment for a total of three years (R. 25). The conviction was reversed by the Court of Appeals for the First Circuit (one judge concurring, one judge dissenting) on the ground that the affidavit supporting the application for a search warrant (in execution of which the still was found) had been insufficient to establish probable cause (R. 28–38).

The affidavit upon which the warrant was issued (R. 4–8) was made and submitted to a Commissioner on August 31, 1961, by Walter Mazaka, an Investiga-

[1] 26 U.S.C. 5171(a), 5173(a), 5602, 5179(a), 5222(a)(1), 5205(a)(2), 5686, and 5681(a).

[2] 18 U.S.C. 371.

tor for the Alcohol and Tobacco Tax Division of the Internal Revenue Service. He stated that he had reason to believe that an illegal distillery was in operation in respondent Ventresca's home at 148½ Coburn Avenue in Worcester, Massachusetts. The grounds for this belief were set forth in detail on an attached sheet (R. 5–8), prefaced with the following statement:

> Based upon observations made by me, and based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made.

The sheet then set forth seven different occasions between July 28 and August 30, 1961, when a Pontiac car was driven into the yard to the rear of Ventresca's home in Worcester. The car was identified as being owned and driven by Joseph Garry with Joseph Incardone as passenger. On four occasions the car carried loads of sugar in sixty-pound bags (July 28, August 7, August 16, August 24); on two occasions it carried empty tin cans (August 11, August 28); and on one occasion it was merely observed as being heavily laden (August 7). On three of these occasions (July 28, August 7, August 11) Garry and Incardone had been seen loading the car. On two occasions (August 16 and August 24) Garry and Incardone were observed arriving at Garry's home at about midnight, after having left Ventresca's house.

They removed five-gallon cans from the trunk of Garry's car and carried the cans—which appeared to be filled—into Garry's home two at a time. On August 28, after a delivery of empty tin cans to Ventresca's house, Garry and Incardone were seen carrying cans which appeared to be filled from the house and placing them in the trunk of Garry's car. With regard to all of the foregoing observations, the persons making the observations were not specified.

In two additional paragraphs relating to August 18 and August 30, the sheet stated that "Investigators" smelled the odor of fermenting mash as they walked along the sidewalk in front of the premises at 148½ Coburn Avenue at approximately 4:00 a.m. On August 18 they heard, "[a]t or about the same time," "certain metallic noises which cannot be further identified by source or sound" (R. 7). On August 30, the day before the warrant was applied for, they heard (as they smelled the mash) "sounds similar to that of a motor or a pump coming from the direction of 148½ Coburn Avenue" (R. 8).

The sheet attached to the affidavit concluded:

> The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation.

The district court upheld the validity of the warrant on a motion to suppress (R. 15–19). However, the court of appeals (Hartigan, J.) held the warrant invalid (R. 28–36). On the basis of the intro-

ductory and concluding statements on the sheet attached to the affidavit, the court reasoned (1) that all of the information recited in the affidavit may have been gathered by Investigators other than affiant Mazaka and (2) that there was no way to be sure that the information of these other Investigators was not in turn based upon hearsay received from unreliable informants. Because Mazaka could not vouch for the reliability or trustworthiness of the sources of information which thus might have been used by other Investigators, the court found that probable cause had not been established under *Jones* v. *United States,* 362 U.S. 257. Judge Aldrich concurred (R. 36–37) and Chief Judge Woodbury dissented (R. 37–38).

SUMMARY OF ARGUMENT

Upon a fair reading, the affidavit in this case established probable cause for the issuance of the search warrant. The affidavit showed that, before applying for a warrant Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service conducted a month-long investigation during which they gathered considerable circumstantial evidence showing the operation of an illegal still at respondent's residence. The affiant swore, moreover, that the warrant was applied for only after Investigators, for the second time, smelled the odor of fermenting mash at respondent's premises and heard the sound of a pump or motor.

The court of appeals reached the opposite result only by interpreting the affidavit wholly against the

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purposes of the document, much as pleadings were strictly construed against the pleader at common law. Not only is such an approach inappropriate as applied to affidavits customarily composed by non-lawyers, but it would, if approved, tend to disparage the safeguards created by the Fourth Amendment. There are many reasons why searches with warrants are, where possible, constitutionally preferable to searches undertaken without prior impartial scrutiny of the cause to search. Although searches may legitimately be undertaken without warrants in limited circumstances, it is therefore vitally important to encourage, rather than discourage, resort to warrants. Approval of the decision below, which unreasonably frustrated responsible police efforts culminating in an application for a warrant rather than in an attempt to search without a warrant, would only tend to encourage police to avoid the use of a warrant wherever possible. A principal safeguard of the Fourth Amendment would thereby be weakened.

ARGUMENT

The affidavit of Investigator Mazaka reveals that a search warrant was applied for in this case only after Mazaka and other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service had engaged in a careful month-long investigation of respondent Ventresca's residence. The affidavit shows that the Division's investigation included frequent surveillance of Ventresca's home, as well as the surveillance and tracing of automobiles going to and from the home. Considerable circumstantial evidence of

an illegal still within Ventresca's premises was thus uncovered. Finally, the warrant was applied for the day after Investigators, for the second time, smelled the odor of fermenting mash at the house. In short, the affidavit plainly revealed that the search warrant was applied for after a fully responsible police investigation had provided a firm basis for believing that an illicit still was located in Ventresca's home. The affidavit was therefore plainly sufficient.

The court of appeals, however, has found that, since the affidavit did not explicitly negate the possibility that the information related in it may have been gathered by unreliable informants who were not official full-time Investigators of the Alcohol and Tobacco Tax Division, the affidavit must be assumed to be wholly based upon such unreliable information. The court held that the affidavit was therefore insufficient to establish probable cause. We submit that the construction of the affidavit offered by the court of appeals was plainly wrong. We submit further that the court's attitude toward the interpretation of the affidavit would, if approved, tend to defeat substantial justice in criminal proceedings. Perhaps even more important, it would penalize and frustrate conscientious officers who properly apply for warrants at the culmination of their investigations by subjecting them to hypertechnical requirements, albeit they have carefully sought to follow the constitutional and statutory procedures and have scrupulously observed every substantial right of the persons suspected.

I

THE AFFIDAVIT ESTABLISHED PROBABLE CAUSE

1. If the events related in the sheet attached to Investigator Mazaka's affidavit were, in fact, observed as they took place, they unquestionably established probable cause to search for and seize an illegal still upon respondent Ventresca's premises. The affidavit recounted frequent deliveries of large quantities of sugar in sixty-pound bags to Ventresca's house, deliveries of empty tin cans to the house, and of full cans from it. These events alone created strong circumstantial suspicion of the operation of an illegal still. Issuance of a warrant plainly became justified when, on August 30 (the day before the warrant was applied for), the odor of fermenting mash was for the second time detected by investigators at Ventresca's house, accompanied on this occasion by the sound of a motor or pump. See *Garhart* v. *United States,* 157 F. 2d 777 (C.A. 10). Indeed, a qualified officer's detection of the smell of mash would alone have supported the issuance of a search warrant in this case. *Monnette* v. *United States,* 299 F. 2d 847, 850 (C.A. 5); *Steeber* v. *United States,* 198 F. 2d 615, 616, 618 (C.A. 10); *United States* v. *Kaplan,* 89 F. 2d 869 (C.A. 2); *United States* v. *Seiler,* 40 F. Supp. 895 (D. Md.). See *Chapman* v. *United States,* 365 U.S. 610, 615; *Johnson* v. *United States,* 333 U.S. 10, 13. Suffice it to say that the court of appeals, although ultimately finding no probable cause, made no suggestion whatsoever that the observations related in the affidavit would not, if believed, have established probable cause.

2. The court of appeals, however, found the reported observations to be unreliable and not entitled to belief. Its first basis for this holding was its conclusion that it was compelled to deem all of the observations embodied in the affidavit as constituting hearsay. The court seems to have relied here upon Mazaka's statements in the introductory and concluding paragraphs of the sheet attached to the affidavit—on which the result of the investigation was set forth in detail—that the information set forth had been "received officially from other Investigators" and "obtained from Investigators * * * assigned to this investigation" as well as being based upon "observations made by me" and "personal knowledge" (R. 5, 8). In the court's view, at least some of the facts alleged were therefore hearsay and since the "affidavit failed clearly to indicate which of the facts * * * were hearsay or which were within the affiant's own knowledge," the Commissioner was compelled to conclude "that the entire affidavit was based on hearsay" (R. 33).

We submit that the court's conclusion that Mazaka's affidavit related only hearsay was plainly erroneous. Unquestionably, some of the information contained in the affidavit was hearsay, for the investigation described by Mazaka involved a number of Investigators in addition to Mazaka, who reported their findings to him. However, there is simply no basis for conclusively assuming on this basis—in the face of Mazaka's sworn assertions that the relevant information was in part based "upon observations made by

tions Mazaka made personally and which were reported to him by others, it was appropriate to consider whether there was substantial basis for crediting the reports of others upon which Mazaka's affidavit may have essentially been based. We firmly disagree, however, with the court's finding that there was no such basis in this case, for it seems to us that Mazaka's affidavit clearly demonstrates that the reports of others (which it incorporated) were reports of observations made by other Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service assigned with Mazaka to the investigation of Ventresca's activity.

As previously noted, Mazaka swore that, insofar as the affidavit was not based upon his own observations, it was "based upon information received officially from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and reports orally made to me describing the results of their observations and investigation." R. 5.) At another point, Mazaka swore that his information was "based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division * * * who have been assigned to this investigation." (R. 8.) This language can only be read as meaning that, insofar as Mazaka himself did not report his own observations, he related information given him, either orally or in writing, by other Investigators of the Division. Observations of fellow officers engaged in a single investigation are plainly a reliable basis for a warrant applied for by

me" and "upon personal knowledge,"[1]—that *all* of the affidavit was therefore hearsay. Although the precise extent of Mazaka's participation in the investigation is unknown, it is clear that at least *some* of the reported observations were made by him.

3. Beyond this, the conclusion of the court of appeals that the entire affidavit was based upon information gathered in the first instance by Investigators other than Mazaka, did not alone compel it to find the affidavit insufficient. The court correctly held that, even though the entire basis of the affidavit might have been hearsay, the affidavit would still be sufficient "so long as a substantial basis for crediting the hearsay is presented." *Jones* v. *United States*, 362 U.S. 257, 269. We agree that since the affidavit did not make clear which of the relevant observa-

[1] The court construed Mazaka's statement that the "foregoing information is based upon personal knowledge and information which has been obtained from Investigators * * * who have been assigned to this investigation" (R. 8) as meaning "that such 'personal knowledge and information' was obtained [entirely] from other Investigators" (R. 33.) Thus, in the court's view, Mazaka swore that the "personal knowledge" *and* the "information" were *both* obtained from others—neither was attributable to Mazaka himself. The court of appeals' interpretation seems clearly wrong on two accounts: (1) At the beginning of his statement, Mazaka swore that the application for a warrant was "[b]ased upon observations made by me, and based upon information received officially from other Investigators * * *." Thus Mazaka made it entirely explicit that some "personal knowledge" was his. (2) The court's interpretation is ungrammatical. If Mazaka had meant to say that he received both the "personal knowledge" and the "information" from other Investigators, he would have said that "the foregoing information is based upon personal knowledge and information which *have* been obtained from Investigators * * *."

one of their number.[4] *Chin Kay* v. *United States*, 311 F. 2d 317, 320 (C.A. 9); *United States* v. *McCormick*, 309 F. 2d 367, 372 (C.A. 7), certiorari denied, 372 U.S. 911; *Weise* v. *United States*, 251 F. 2d 867, 868 (C.A. 9), certiorari denied, 357 U.S. 936; *United States* v. *Bianco*, 189 F. 2d 716, 719 (C.A. 3); see *Monnette* v. *United States*, 299 F. 2d 847, 850 (C.A. 5); *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2). In *Rugendorf* v. *United States*, 376 U.S. 528, this Court held an affidavit sufficient where the only bases for its issuance were reports from F.B.I. agents and information from a confidential informant. The present case is even stronger. At least some of the relevant observations here were, as we have shown, observations made by Mazaka himself, and this personal knowledge of the affiant lent credence to reports of other Investigators received by him and related in the affidavit. Nor is it important that the Investigators making each observation were not named and the information attributable to each speci-

[4] The court below noted that in the case of *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7), "it was held that an affidavit based on hearsay relayed from one federal agent to another was insufficient." (R. 35.) There, the affidavit averred the receipt of "confidential information, from a source which in the past has proved reliable." On a hearing involving the asserted falsity of the affidavit, it was disclosed that the information "was not only relayed three or four times from one agent to another but when the source which in the past had 'proved reliable' was finally divulged it was found to be a stranger previously unknown to any member of the relay team" (275 F. 2d at 321, 323). It is apparent that the decision holding the affidavit insufficient rested on the misstatement of fact in the affidavit, not on the fact that the information in the affidavit had been communicated between officers.

fied.[5] See *United States* v. *McCormick*, 309 F. 2d 367 (C.A. 7), certiorari denied, 372 U.S. 911. The "knowledge of each was the knowledge of all." *United States* v. *Romero*, 249 F. 2d 371, 374 (C.A. 2). Even non-official informants ordinarily need not be identified. *Rugendorf* v. *United States*, 376 U.S. 528; *Jones* v. *United States*, 362 U.S. 257.

The court of appeals, while agreeing that Mazaka's information clearly came from other Investigators of the Alcohol and Tobacco Tax Division, did not, however, agree that the affidavit showed that these Investigators necessarily related first-hand information. Instead, the court found a "distinct possibility of hearsay-upon-hearsay," (R. 35) *i.e.*, the information reported to Mazaka may have been gathered, not through personal observation, but through outside informants of uncertain reliability. On the basis of this speculation, the court held the entire affidavit unreliable.

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[5] The case of *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2), judgment vacated and appeal dismissed on procedural grounds, 369 U.S. 121, cited by the court below (R. 36) and by respondent (Brief in Opp. to Cert., pp. 6–7), is inapposite. There, a complaint was found insufficient to support an arrest warrant under Rule 5(a), F. R. Crim. P., where it recited generally that the relevant information and belief was based not only upon observations of the affiant and reports of the Bureau of Narcotics, but upon statements of "other witnesses." Unlike the present case, the detailed factual basis for the affiant's belief was not set forth—the complaint included only the conclusory charge and the above general averment of sources. Significantly, in the same case, affidavits which did set forth facts gathered by the affiant, unnamed "other witnesses," and unnamed "Agents of the Bureau of Narcotics," were held sufficient to demonstrate probable cause.

The assumption of the court of appeals that all of the information in Mazaka's affidavit may in fact have come from unreliable informants is without foundation. The detailed observations recounted in the affidavit cannot fairly be regarded as having been made in any major part by persons other than full time Investigators of the Alcohol and Tobacco Tax Division of the Internal Revenue Service. It is apparent from the events described in the affidavit that the investigation of Ventresca's premises was not one in which informants would normally be engaged. The investigation was an organized month-long surveillance participated in by several persons. It involved surreptitious glances through the windows of a parked automobile, repeated night-time walks on a public sidewalk past Ventresca's residence, observations at other places, and the surveillance of moving automobiles in Worcester and between Boston and Worcester. None of the repeated observations were made from a vantage point which would have been peculiar to a confederate; all appeared, to the contrary, to be the product of clandestine investigations for which Investigators are specially trained. While information from private informants may have been used as a starting point for the investigation, it is wholly unreasonable to suppose that this detailed investigation in itself was entirely or even principally delegated to such persons. The existence of private informants is not suggested in any way whatsoever by Mazaka's affidavit. Therefore, to conclude not only that such informants existed, but that they were the

sole or even the primary source of the information related in the affidavit, was unwarranted.

However, even if it could be assumed that Mazaka's affidavit contained some observations made by other informants, that information, communicated through Investigators of the Division, would nevertheless be entitled to credence even in the absence of any identification or description of the informers. The known trustworthiness of an informant is not the sole means of crediting his information. Corroboration of his story by independent evidence is an accepted, even preferable, means of assuring verity. If we are correct in believing that at least some of the observations related in the affidavit were unquestionably made by official Investigators, these observations would have corroborated similar observations of suspicious activities reported by private informers. See *United States* v. *Woodson,* 303 F. 2d 49 (C.A. 6), certiorari denied *sub nom. Grant* v. *United States,* 373 U.S. 941. For example, observations on any occasion by Investigators of the delivery of empty five-gallon cans and numerous sixty-pound bags of sugar to Ventresca's residence would provide a basis to give credence to similar reported observations by others. Finally and conclusively, even if it be assumed that the court of appeals was correct in regarding *all* the observations which were not specified as to source as having been made by unreliable private informants, there is no way to avoid the fact that the affidavit specifically credited the detection of the distinctive odor of fermenting mash coming from Ventresca's residence to Investigators of the Internal Revenue Service. Since this evidence alone was suffi-

cient to establish probable cause, see p. 10, *supra*, the warrant had a sufficient basis.*

In sum, no matter how hypertechnical an approach is employed, Mazaka's affidavit established probable cause. Given any fair reading, its sufficiency was manifest.

II

AN UNDULY NEGATIVE ATTITUDE TOWARD INTERPRETING APPLICATIONS FOR SEARCH WARRANTS—EXEMPLIFIED IN THE APPROACH OF THE COURT BELOW—WILL TEND TO DEFEAT THE OBJECTIVES OF THE FOURTH AMENDMENT

We have demonstrated that any fair interpretation of the application for the warrant in this case shows facts establishing probable cause. The court of appeals reached the opposite result only by reading the application, like a common-law pleading, wholly against the purposes of the document. Thus the court placed upon the affiant the burden to negate every inference which might defeat a finding of probable cause. For example, after correctly stating that the affidavit revealed that not all of the observations recited in it were personally made by affiant Mazaka, the court detected that the affidavit nowhere specified which observations Mazaka made and which were made by others. From this the court reached the unwarranted conclusion that the "Commissioner could only

* To the extent (as suggested in the concurring opinion below at R. 37) that the decision holds that the affidavit will fall if some of its averments are by themselves uncredited and insufficient to support the warrant, it is incorrect. If an affidavit contains any facts sufficient to establish probable cause, the warrant will be upheld. *Chin Kay* v. *United States*, 311 F. 2d 317, 321–322 (C.A. 9); *Clay* v. *United States*, 246 F. 2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863.

conclude that the entire affidavit was based on hearsay" (R. 33). That is, since Mazaka did not say which observations were not hearsay, the affidavit was construed to contain only hearsay, to the exclusion of all other evidence. This despite Mazaka's explicit sworn statement that he had in fact made some of the relevant observations himself.

In a construction even more vital to the case, the court treated the affidavit as saying that none of the observations reported by the Investigators were based upon their personal knowledge or observation of the facts, but came, instead, from unreliable informants nowhere mentioned in the application. The basis of this holding was that Mazaka had not explicitly stated that any particular portion of the investigation was undertaken first-hand by Investigators, and that he had sworn in one place that the affidavit was based upon "information which has been obtained from Investigators" (R. 8). The court construed the latter statement as permitting the inference that none of the Investigator's information was "first-hand"—since it did not say otherwise (R. 35)—and that the second-hand information was unreliable—since Mazaka, who did not mention informants other than Investigators, obviously did not show their reliability. The interpretation in this instance was even more remarkable (1) because Mazaka had specifically sworn that two crucial observations—those detecting the odor of fermenting mash—had indeed been made by "Investigators," and (2) because Mazaka had generally sworn at the outset of his description that the affidavit contained "the results of their [the Investigator's] observations and investigation" (R. 5). Thus not only were the

most negative interpretations of ambiguities adopted, but such interpretations were adopted even as against explicit affirmative statements to the contrary elsewhere in the affidavit.

We have tried to show that, even laboring under the strictest possible rules of construction, the affidavit here sufficiently established probable cause. Whether the particular affidavit in this case justified a warrant is, however, of no general importance. What *is* important is the attitude with which courts will approach the interpretation of affidavits seeking warrants. More is involved than merely the incongruity of applying hypertechnical requirements of clarity and explicitness against documents which are normally drafted quickly by nonlawyers in the midst of a criminal investigation. That consideration alone would strongly counsel against the attitude of the court of appeals. Much more significant, however, it should be evident that a grudging or negative attitude toward applications for warrants—finding unintended ambiguities and construing them to defeat the obvious meaning of the application—will have a direct and harmful bearing upon the due enforcement of the safeguards embodied in the Fourth Amendment. The constitutional policy of closely regulating searches and seizures, expressed in the rule that they be undertaken only with respect to specific objects and only upon probable cause, clearly favors procedures whereby police act pursuant to warrants rather than upon their own judgment that probable cause exists. Although there are limited exceptions to the requirement that searches be undertaken only after a warrant

has been obtained,' this Court has therefore frequently stressed the desirability of having officers, where possible, submit the facts which they deem to justify an invasion of privacy to the impartial decision of a Commissioner or judge before they act. *Aguilar* v. *Texas,* 378 U.S. 108, 111; *Chapman* v. *United States,* 365 U.S. 610; *Jones* v. *United States,* 362 U.S. 257; *Johnson* v. *United States,* 333 U.S. 10; *McDonald* v. *United States,* 335 U.S. 451; *United States* v. *Lefkowitz,* 285 U.S. 452. Not only does such a procedure tend to minimize unnecessary invasions of privacy, but police are apt to act more responsibly, and there is less likely to be resentment against their intrusion, when they act under the warrant of an impartial officer specifically describing the place to be searched and the thing or things to be seized. Indeed, in two recent cases similar in many respects to the present case, the Court has explicitly criticized hasty action by officers who spontaneously invaded premises without a warrant on the basis of telltale odors, indicating that the proper course would have been to obtain a warrant, as the Investigators did here. *Johnson* v. *United States, supra; Chapman* v. *United States, supra.*

The decision of the court of appeals in this case stands squarely against the preference thus accorded

[7] Investigators such as those involved in this case are authorized to arrest without a warrant for any offense committed in their presence or for any felony they have reasonable grounds to believe has been committed (26 U.S.C. 7608(3)). As incident to that arrest, a search of the immediate premises may be made. *United States* v. *Rabinowitz,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145. See *Abel* v. *United States,* 362 U.S. 217, 235.

to police action taken under a warrant. Should it become evident that affidavits supporting applications for warrants will, as here, be subjected after the fact to unduly restrictive interpretations, the inevitable effect would be to discourage investigators from submitting their evidence to a judge or Commissioner before acting. If a basis for action without a warrant existed, investigators in possession of facts which they know to establish probable cause would naturally tend to favor that course rather than hazard the risk that an hypercritical eye might find a flaw in the warrant and thus set the entire investigation at naught. In cases where an officer acts without a warrant, should ambiguities arise in his testimony at the hearing where he is called upon to show probable cause, a government attorney is present to draw out all the details which supported the action and to resolve the ambiguities on the spot, rather than having them unfailingly resolved against the officer, as in the present case.

In a very similar situation, this Court, in *Jones* v. *United States*, 362 U.S. 257, 270–271, was careful to insure that the requirements for obtaining a valid warrant would not thus be made more strict that the requirements for acting without a warrant. In *Jones*, the question was whether hearsay could support a warrant, where it had already been held that similar hearsay could support police action without a warrant. The Court said:

> If evidence of a more judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant must be presented when a warrant is

> sought, warrants would seldom legitimatize police conduct, and resort to them would ultimately be discouraged. Due regard for the safeguards governing arrests and searches counsels the contrary. In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

Similarly, in this case, we submit that the Court should make it clear that the requirements for acting pursuant to a warrant will not be made so technical and restrictive that "resort to them would ultimately be discouraged." We do not suggest that the Court give its blessing to scanty affidavits which, through conclusory assertions and an absence of specificity, might well conceal an absence of probable cause. Read fairly, the affidavits presented in the application for a warrant must show probable cause to believe specific facts upon which an inference of guilt can be based. *E.g., Aguilar* v. *Texas,* 378 U.S. 108, 114. Here, that standard was fully satisfied. The officers conducted a lengthy and thorough investigation and, before acting to invade privacy, they procured a warrant on the basis of detailed allegations indicating guilt. Where officers thus follow the course best designed to safeguard the constitutional interest in preserving individual freedom from unnecessary or arbitrary searches, it would defeat the ends of justice to frustrate their efforts through pleading

requirements which ignore the care with which the officers proceeded.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that this Court should reverse the judgment of the court below.

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SEPTEMBER 1964.

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[8] In addition, the holding below failed to give proper weight to the finding of the Commissioner, to whom the application for search warrant was presented, who made a determination that the facts detailed in the affidavit disclosed probable cause for issuance of the warrant (R. 9). Had he found ambiguities in the warrant, technical or otherwise, they could have been corrected then. It is therefore not appropriate for an appellate court, after the warrant has been issued, to determine whether through any arguable interpretation of the language which the Commissioner did not adopt, he could possibly have found that the affidavit was not sufficient. The judgment of the Commissioner should be sustained if it is reasonably justified under an appropriate interpretation of the affidavit. *E.g.*, *Irby* v. *United States*, 314 F. 2d 251, 253 (C.A.D.C.), certiorari denied, 374 U.S. 842; *United States* v. *Nicholson*, 303 F. 2d 330, 332 (C.A. 6), certiorari denied, 371 U.S. 823; *United States* v. *Spears*, 287 F. 2d 7, 9–10 (C.A. 6); *United States* v. *Ramirez*, 279 F. 2d 712, 716 (C.A. 2). It does not matter that he "might have found the affidavit insufficient and withheld his warrant." *Jones* v. *United States*, 362 U.S. 257, 271.

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No. 28

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA,
Petitioner,

vs.

GIACOMO VENTRESCA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The Indictments

The defendant Ventresca was indicted under Indictment No. 62-257-C returned and filed on August 20, 1962, (pages 16-20 of Appellant's Rec.App. before C.A.). The indictment charged him with certain violations of the Internal Revenue Code as follows: Count 1, 26 U.S.C. 5171(a) failure to register a still; Count 2, 26 U.S.C. 5173(a) failure to file a bond; Count 3, 26 U.S.C. 5602, intent to defraud United States of tax; Count 4, 26 U.S.C. 5179(a) possession of an unregistered still; Count 5, 26 U.S.C. 522(a)(1) possession of mash in unbonded premises; Count 6, 26 U.S.C. 5205(a)(2) possession of

distilled spirits in unstamped containers; Count 7, 26 U.S.C. 5686, possession of liquor and property with intention to violate Internal Revenue Code; Count 8, 26 U.S.C. 5180(a) and 26 U.S.C. 5681, failure to post a sign.

In addition to the above, the defendant was charged along with others (Count 11) with conspiracy to commit said violations. This conspiracy count was subsequently dismissed on motion of the Government and the defendant was re-indicted for the same alleged conspiracies under indictment No. 62-290-C returned by the Grand Jury on September 7, 1962 (pp. 20-23 of Appellant's Rec.App. before C.A.)

The Search and Seizure

Prior to his indictment, certain premises at 148½ Coburn Avenue, Worcester occupied by the defendant and his family were searched under the ostensible authority of a federal search warrant.

A written application for the search warrant had been made on August 31, 1961 by one Walter A. Mazaka, Investigator of the Alcohol and Tobacco Tax Division, Internal Revenue Service, U.S. Treasury Department, to the Honorable W. Arthur Garrity, United States Commissioner, District of Massachusetts, Worcester, Massachusetts, (R. 2). Accompanying said application was a written "Affidavit for Search Warrant" signed by the said Mazaka and sworn to in the presence of said Commissioner on August 31, 1961, (R. 4-9)

Following receipt of said application and affidavit the said Commissioner issued a search warrant dated August 31, 1961 and identified as Commissioner's Docket No. 1, Case No. 186, (R. 8, 9). On September 1, 1961, the said Mazaka, together with others acting under his authority and control, searched the subject premises, seized certain

articles situated therein, and seized and destroyed others. A return of the warrant was then executed and filed by Mazaka in which was included an inventory of the items seized and of the items seized and destroyed.

The Motion to Suppress

Following the two indictments the defendant duly filed Motions for the Return of Seized Property and for the Suppression of Evidence. Companion motions were filed in the case of each indictment, (R. 10-15)

The Preliminary Hearing

Defendant's various preliminary motions, together with his motions to suppress evidence were heard on October 10, 1962 by the U. S. District Court, Caffrey, D. J. sitting, following which the Court filed a Memorandum and Order in each case under date of December 31, 1962, (R. 15-19)

The Jury Trial

The defendant having pleaded 'Not Guilty' the case was tried before United States District Judge Andrew A. Caffrey and a Jury resulting in a verdict of guilty on all counts of each indictment.

At the commencement of the trial, after the jury was empanelled and after the government's attorney made his opening statement, but before any testimony was introduced, the defendant Ventresca orally renewed his motion for the return of seized evidence and to suppress its use as evidence in the same form of the written motion filed earlier which the Court denied by Memorandum and Order on December 31, 1962. The motion as renewed was denied and the defendant duly objected, (R. 20)

During the course of the trial and as the government sought to introduce testimony or exhibits as to the results of the search of the defendant's premises at 148½ Co-

burn Avenue, Worcester, the defendant made a general objection which the Court accepted (R.App. pp. 38-39).

At the close of the evidence, after both parties had rested, and before arguments of counsel, the defendant Ventresca duly filed a Motion for Judgment of Acquittal in each case. The motions were denied and the defendant duly objected, (R. 21-24)

Judgment and Notice of Appeal

Following the jury's verdicts of guilty on all counts of both indictments, the Court entered judgments of guilty in each case on April 15, 1963 and imposed sentence. (R. 24-27). Following entry of the judgments, the defendant duly filed Notices of Appeal in each case.

The Court of Appeals (1st Circuit)

Following a hearing before the Court of Appeals for the First Circuit, that Court (Hartigan, J.) entered an opinion on November 26, 1963 vacating the judgment of the district court, setting aside the verdict, and remanding the case for a new trial consistent with the circuit court's opinion. Judge Woodbury filed a dissenting opinion and Judge Aldrich in a concurring opinion rebutted the dissent of Judge Woodbury. (R. 28-38). The opinion of the circuit court, including the dissent and the concurring opinion are reported in 324 F(2) 864.

The Petition for Writ of Certiorari

The Petition for Writ of Certiorari was filed on January 23, 1964 and was granted on June 22, 1964 (R. 40).

APPLICABLE STATUTES AND RULES

UNITED STATES CONSTITUTION, FOURTH AMENDMENT

> "The right of the people to be secure in their persons, houses, papers, and effects against unreason-

able searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 7

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged . . ."

RULE 41

(a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) stolen or embezzled in violation of the laws of the United States; or

(2) designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U.S.C., s. 957.

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he

shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

QUESTIONS PRESENTED

Both the appeal to the Court of Appeals and this proceeding before the Supreme Court of the United States question whether the U. S. District Court was right or wrong in declining to suppress evidence seized in a search of the defendant Ventresca's premises on September 1, 1961. More specifically, the action of the District Court under challenge is the court's denial of defendant's pretrial motions to suppress such evidence, its denial of his renewal of such motions at the outset of trial, its continued denial of similar such motions during trial as the evidence itself was presented, and its denial of defendant's motions for acquittal insofar as based on the alleged inadmissibility of such evidence.

This same issue, as now raised on petition for Writ of Certiorari, questions the correctness of the decision of the Court of Appeals in reversing the action of the District Court.

In reversing the District Court, the Court of Appeals held that the written affidavit on which the search warrant was based was inadequate, and that, for that reason, the warrant itself was not issued on probable cause within the meaning of the Fourth Amendment.

It has been and is the defendant's contention that the affidavit was not an affidavit in the true sense of the word; that it failed to show that the affiant or even the persons who reported information to him had personal knowledge of any of the facts germane to a finding of probable cause; that it failed to disclose who could be held to account for the truth of the allegations recited therein, whether the affiant or some other party; that on its face it can only be recognized as a 'hearsay' affidavit; that it contained nothing within itself to meet the substantiation test of the *Jones* case (362 U.S. 257); and that it therefore did not satisfy the requirements of either Rule 41(c) of the Federal Rules of Criminal Procedure or the Fourth Amendment.

The fundamental question therefore is the sufficiency of the affidavit upon which the search warrant issued.

SUMMARY OF ARGUMENT

Since the affidavit failed to show just which of its facts were within the personal knowledge of the affiant, although he claimed some of them were, the affidavit can only be handled as complete hearsay.

As a hearsay affidavit, it should be disqualified for want of substantiation crediting the hearsay. This was the yardstick laid down by this Court in the *Jones* case (362 U.S. 257) decided in 1960.

Not only was there no identification of those who allegedly supplied information to the affiant; the affidavit did not even show that these informants had direct knowledge themselves, or that in transmitting their re-

ports they had direct and personal contact with the affiant.

Those cases which uphold affidavits based wholly or partly on hearsay usually contain one or more features lending credibility to the hearsay which this affidavit did not have.

Where affidavits do not clearly show that the affiant had personal knowledge or substantiation for reported hearsay, magistrates and courts should not infer as the government would have them do in this case, that he did. The right of a private citizen to be secure in the privacy of his home extends with equal force to defendants and those under suspicion as well as to those who are innocent; and the safeguards of the Fourth Amendment should be administered carefully and cautiously with these rights in mind and not, as the government would employ in this case, loosely and casually lest police officials be discouraged and offenders go unapprehended.

ARGUMENT

I. THE SEARCH WARRANT WAS NOT BASED ON A PROPER AFFIDAVIT.

A. The Affidavit was Based on Unsubstantiated Hearsay.

1. *The Phrasing of the Affidavit.*

The affidavit (R. 4-8) was made by one Walter A. Mazaka, concededly an employee of the Alcohol and Tobacco Tax Division of the U. S. Department of Internal Revenue.

In his introductory sentence on the face of the printed form of affidavit, the affiant elected to use the printed words "has reason to believe" rather than the words "is

positive", the latter being deleted. Attached to the printed form of affidavit was a lengthy recitation of fact on which the belief of the affiant is said to have been based.

The first and last paragraphs of the attached recitation of facts are the ones to be noted. They read as follows:

FIRST PARAGRAPH

"Based upon *observations* made by me, and based upon *information received officially* from other Investigators attached to the Alcohol and Tobacco Tax Division assigned to this investigation, and *reports orally* made to me describing the results of their observations and investigation, this request for the issuance of a search warrant is made." (underscoring supplied) (R. 5)

(Eleven paragraphs of facts inserted here without any showing as to who made the observations).

LAST PARAGRAPH

"The foregoing information is based upon personal knowledge and information which has been obtained from Investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, who have been assigned to this investigation." (R. 8).

2. *The Rule of the 'Jones' Case*

(a) A hearsay affidavit must have some substantiation.

It was held in *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725 (1960) that an affidavit based wholly or partly on hearsay is not for that reason disqualified provided there is "a substantial basis for crediting the hearsay". The Court said (p. 269):

> "The question here is whether an affidavit which sets out personal observations relating to the existence of cause to search is to be deemed insufficient by virtue of the fact that it sets out not the affiant's observations but those of another. An affidavit is not to be deemed insufficient on that score, *so long as a substantial basis for crediting the hearsay is presented.*" (italics supplied).

The rule was recently reaffirmed in *Chin Kay* v. *United States*, 311 F(2) 317 (C.A. 9th, 1962):

> "Hearsay evidence may provide the probable cause necessary for either an arrest without a warrant, or for the issuance of an arrest warrant or a search warrant, *if a substantial basis for crediting the hearsay evidence is presented.*" (italics supplied).

But the rule of the *Jones case* has not been viewed as an unqualified acceptance of hearsay affidavits. Something more must be shown. In *United States* v. *Ramirez*, 279 F.(2) 712.715 (C.A. 2nd. 1960) appears the following:

> "*Jones* v. *U.S.* . . . has now established that an affidavit consisting primarily of hearsay information may be sufficient to support the issuance of a search warrant. However, the requirement that the affiant shall have personal knowledge still exists, for under Jones, the affiant must not only believe the hearsay report but in all likelihood the affiant must further demonstrate that his informant has established a reputation for reliability so as to be worthy of belief. *In addition Jones may require that the affidavit include some factual information independently corrobative of the hearsay report*". (italics supplied)

(b) The 'substantial basis' must be contained in the affidavit.

Since a search warrant can issue only on a written affidavit (Rule 41c), the court must confine its attention

to the affidavit and determine if the facts disclosed therein constitute probable cause. A determination of probable cause on facts that were in existence but which were not in the affidavit does not save the warrant.

In *United States* v. *Casino*, 286 F. 976 (S.D. N.Y. 1923) the Court said:

> ". . . it is not material that the other evidence is absent, which was before the commissioner and which may have induced him to deny quashal of the warrant. While under section 16 he must decide after hearing whether on all the facts there were reasonable grounds for the warrant, that does not dispense with the necessity for allegations in the affidavits themselves, which, if true, show a self subsisting ground for the issuance of the warrant. It is not enough that on the hearing other grounds may appear even though not upon evidence extracted by the search itself. The showing for the issue must be enough to stand alone, and must be proved upon the hearing, if challenged. It will not do to abandon the 'reasonable cause' first asserted, and support the search upon a new charge. In this respect the affidavits are like pleadings."

On this point, the Court of Appeals in the present case had this to say (Judge Aldrich's concurring opinion; R. 36):

> "The government's obligation under the Fourth Amendment to justify the issuance of a warrant is far from a 'pro forma' matter. *Marron* v. *United States*, 1927, 275 U.S. 192, 195. This is illustrated by the undisputed rule that deficiencies in its prima facie showing are not remedied by the circumstance that subsequent events prove it was right after all. *Byars* v. *United States*, 1927, 273 U.S. 28."

See also:

> *Giordenello* v. *United States*, 357 U.S. 480. 78 S.Ct. 1245 (1958)

Baysden v. *United States*, 271 F(2) 325 (4th, 1959)
Tripodi v. *Morgenthau*, 213 F.Supp. 735 (1962)
United States v. *Walters*, 193 F.Supp. 788 (D.C. Ark. 1961)
United States v. *Interbartolo*, 192 F.Supp. 587 (D.Ct. Mass. 1961)
United States v. *Nichols*, 89 F. Supp. 953 (W.D. Ark. 1950)

3. *The Mazaka Affidavit Failed to Meet the Test of the 'Jones' Case*

(a) It can only be considered as based wholly on hearsay.

(1) *Analysis of the Affidavit.*

Rule 41(c) of the Federal Rules of Criminal Procedure uses the word "affidavit". It is presumed to have used the word in its usual and proper sense. The word is the equivalent of the perfect tense, third person singular, of the Latin verb, "affido", meaning to plight one's faith. Translated it means, he has sworn to the truth, or he has made oath.

By its very definition an affidavit is a statement of fact by a person under oath as to matters of personal knowledge or as to things known to be true. Otherwise, it is difficult to see how an oath can confidently be taken.

In this case the alleged affidavit falls short of what an affidavit ought to be.

In his first paragraph the affiant apparently swears that some of his information came from his own observations, that some was received officially from other investigators, and that some was based on oral reports. He fails to show which facts were personally observed and which were hearsay. The lengthy recitation of facts is without any specific identification or definition in this regard. It could well be that none of the essential

facts set forth in the affidavit were actually witnessed or established by the affiant. It could well be that his personal "observations" were inconsequential on the matter of establishing probable cause. It could well be that the only fact known to the affiant was the defendant's address.

By stating in one breath that the facts in the affidavit stem from personal observation, from official information, and from oral reports, the affiant muddied the waters and made impossible, except by conjecture, any separation as to what facts were based on knowledge and what were hearsay. The commissioner is not entitled to guess which part of the affidavit is the personal knowledge of the affiant. He can only handle it as total hearsay.

The second quoted paragraph, like the first, eliminates any possibility of separating fact from hearsay. It contains an intrinsic contradiction. Literally read, it states that the information "is based upon personal knowledge and information . . . obtained from investigators", etc. etc. But knowledge (and/or information) obtained from others is not "personal" knowledge under laws of judicial evidence. (*United States* v. *Greenberg*, 320 F (2) 467(C.A.9th,1963). The affiant did not use the disjunctive as he did in the first quoted paragraph and say his information was based upon personal knowledge, and upon information obtained from others. He leaves room for a construction that all his knowledge and information came from others. Hence the second quoted paragraph, even more than the first, shows that, as to the defendant, the affidavit must be regarded total hearsay.

Confronted with this situation, the court of appeals said:

"The affidavit failed to clearly indicate which of the facts alleged therein were hearsay or which were within the affiant's own knowledge. Although the affiant claims part of the information to be based upon 'personal knowledge and information,' it is stated that such 'personal knowledge and information' was obtained from other Investigators."

"Limited to the four corners of the affidavit, there was no way for the Commissioner to determine how much of the factual recitation was based on hearsay and how much was based on personal knowledge of the affiant. It could well be that none of the essential facts set forth in the affidavit were actually witnessed or established by the affiant. The Commissioner could only conclude that the entire affidavit was based on hearsay". (R. 33)

(2) *The Government has conceded this point.*

In its brief the Government has apparently conceded this point. Quoting from pages 12 and 13 of the brief:

"we agree that since the affidavit did not make clear which of the relevant observations Mazaka made personally and which were reported to him by others, it was appropriate to consider whether there was substantial basis for crediting the reports of others upon which Mazaka's affidavit may have essentially been based".

(3) *Mere assertion of personal knowledge adds nothing.*

The mere fact that an affiant may say quite gratuitously, that the information in his affidavit is a matter of personal knowledge, or is a fact, doesn't make it so in the absence of facts to support such a statement. An opinion or a conclusion will not suffice.

In *United States* v. *Nichols*, 89 F.Supp. 953 (W.D. Ark. 1950) an affidavit based on hearsay was not strengthened by a statement that the affiant "was sure".

See also *United States* v. *Interbartolo*, 192 F.Supp. 587 (D.Ct., Mass. 1961) where it made no difference that the affiant said the statements were made on his personal knowledge.

See also *United States* v. *Greenberg*, 320 F(2) 467 (C.A. 9th, 1963) involving an affidavit containing only hearsay; and where the acquittal was confirmed, although the affiant claimed he had personal knowledge.

(b) Neither the origins nor the reliability of the hearsay were substantiated.

(1) There was no showing that the reports given to the affiant were matters of personal knowledge to the persons so reporting.

Not only were the so-called government investigators nameless and faceless, the affidavit gave no assurance that the matters reported to the affiant by the so-called investigators were observed by them.

The first paragraph said that the investigators gave oral reports to the affiant "describing the results of their observations and investigation". At the most we have an affidavit by the affiant that he heard something from investigators who themselves had come upon the information in the course of an investigation. As to this, the court of appeals said:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term 'investigation' are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants,

> the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (R. 35)

A similar holding on a somewhat similar set of facts is found in *Dibella* v. *United States*, 284 F. 2d 897 (C.A. 2d. 1960) (appeal later dismissed on procedural grounds, 369 U.S. 121). It was held that an arrest warrant had issued illegally on the basis of an insufficient complaint (seizure of goods sustained on other grounds). The complaint contained language very much like the affidavit in the instant case, to wit:

> "That the source of your deponent's information and the grounds for his belief are your deponent's personal observations in this case, the statements of Samual Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics."

In striking down the warrant for arrest, the Court said (at p. 900):

> "It is particularly deficient in setting forth the sources of his information or grounds for his belief. True, it recites that his belief an offense had been committed was grounded on his 'personal observations in this case, the statements of Samuel Panzarella and other witnesses in this case, and the reports and records of the Bureau of Narcotics' but what other sources could there possibly be? Such a shotgun, all encompassing, enumeration is no better than none at all. There is no indication of what he had personally observed, what he had heard from others or what he learned from the reports and records of the Bureau of Narcotics. Neither is there presented the basis for crediting the hearsay of the nameless other witnesses or the unidentified reports and records. The complaint is no better than that in *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245 (1958) and the warrant is invalid for the same reasons."

In *Aguilar* v. *State of Texas* 378 U.S. 108, 84 S.Ct. 1509 (1964) the court, in holding that an affidavit failed to pass muster, stated as follows:

> "The vice in the present affidavit is at least as great as in Nathanson and Giordenello. Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an "affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge'. For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on * * * to show probable cause'. He necessarily accepted 'without question' the informant's 'suspicion', 'belief' or 'mere conclusion'."

In *Tripodi* v. *Morgenthau*, 213 F. Supp. 735 (S.D. N.Y., 1962), the Court struck down a search warrant by reason of an insufficient affidavit. The affiant stated that "the facts tending to establish the grounds for issuance of the warrant were oral statements made to your deponent and investigations made by your deponent during the course of his official duties including personal observations of gambling paraphernalia in the premises."

In *Masiello* v. *United States*, 304 F(2) 399 (D.C. 1962) the Court wrestled with the problem of a joint affidavit and with a charge that it was impossible to tell just which observations were made or were not made by the affiants individually. Although the court sustained the affidavit on the grounds that one of the affiants saw all, it recognized a serious problem in the use of a joint affidavit unless it is made clear that either one or both of the affiants were responsible for the entire statement.

Similarly, in *United States* v. *Castle*, 213 F. Supp. 56, 57 (D.Ct. D.C. 1962) a joint affidavit was sustained because it specified "with complete clarity which items of information were known by each of the affiants".

But in the instant case we have less than a joint affidavit; we have joint hearsay reported to one person, Mazaka, who then consolidated all reports in one affidavit of his own. The anomaly lies in the fact that if all the investigators reporting to Mazaka had signed a joint affidavit, either with or without Mazaka, it would be in trouble under the doctrines of the *Tripodi* and *Masiello* cases, *supra*. But where Mazaka signed it alone, the Government contends it is valid. Yet there seems no reason to give it greater credit where only one signs it rather than all, where the one who signed it does not declare himself responsible for all of the facts.

In *United States* v. *Pearce*, 275 F.(2) 318 (C.A. 7th 1960), it was held that an affidavit based on hearsay relayed from one federal agent to another did not qualify. The affiant, an FBI agent, had received his information from his superior, who in turn had received it from an FBI agent in Seattle, who in turn had received it from a reliable informer. The Court pointed out that the affiant was therefore in no position to swear he had received his information from "a source which in the past has proved reliable".

(2) Nor were the persons who made the reports to the affiant named, identified, or otherwise established as reliable.

Assuming for the sake of argument that there was no hearsay upon hearsay and that those who reported the facts to the affiant observed them first hand, the affiant still did not identify the sources of his information other than to say it came from investigators. This deficiency is not always fatal, as in cases where there is other substantiation for crediting the hearsay; but where there is

nothing but the hearsay as defendant contends is the case here, it becomes necessary to know something about the person or persons on whom the affiant has relied.

Although he says he received his information from investigators attached to the Alcohol and Tobacco Tax Division, he does not identify them by name or other description. He assumes a judicial finding as to their reliability without judicial strain. Nothing is said as to who they were, whether full time or 'ad hoc' employees, whether new or old in the service, whether well known to the affiant or not, whether attached to the same division as the affiant or not, or whether found to be reliable in the past or not. His form of affidavit necessitates a judicial determination that the hearsay of these individuals owes its substantial basis for credibility to the mere fact that these people were employees of the government assigned in this case, to the same type of work as is the affiant.

In *Schoeneman* v. *United States*, 317 F(2) 173 (D.C. 1963) the Court said:

> "Agent Richardson's affidavit before the commissioner was predicated on still another affidavit before another agent. In establishing probable cause, of course, the commissioner may rely upon hearsay information 'so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.' *Jones* v. *United States*, supra, 362 U.S. at 269, 80 S.Ct. at 735. But here the corroboration only attempts to show that the informant is reliable. Briefiy, it indicates that the undisclosed informant is a former Government employee, that he is now a business executive, that he made his statement under oath, and that he did have a meeting with Markham. The statement in the affidavit that he 'is believed to be reliable' is ambiguous, apparently meaning that the FBI as an entity believed him reliable, but not committing the affiant."

In *Baysden* v. *United States*, 271 F.(2d) 325 (C.A. 4th 1959) an affidavit supporting a search warrant said the officers had been informed that a quantity of counterfeit money was present in the property sought to be searched. The affidavit was held insufficient since it did not identify the informant from whom the information had been received.

In *United States* v. *Betz*, 205 F.Supp. 927 (E.D. Mich. S.D. 1962) a search warrant was struck down for having been issued on an insufficient affidavit. Although the affiant claimed to have confidential information, considered reliable, that the defendant was engaged in criminal activity in his home, the affidavit was held devoid of "substantial basis for crediting the hearsay."

In *United States* v. *Gebell*, 209 F.Supp. 11 (E.D. Mich. 1962) the court struck down a search warrant based on an affidavit it felt was insufficient. The affiant said his information was based upon confidential information considered reliable that a handbook operation was being conducted on the premises to be searched. The Court held this was insufficient and that the defect was not cured by other facts recited in subsequent paragraphs of the affidavit.

See also:

Wong Sun v. *United States*, 371 U.S. 471, 83 S.Ct. 407, pp. 479-482

Castillon v. *United States*, 298 F(2) 256 (C.A.9th, 1962)

United States v. *Elliot*, 210 F. Supp. 360 (D.Ct. Mass. 1962, Julian, J.)

United States v. *O'Donnell*, 209 F. Supp. 332 (Maine S.D. 1962)

United States v. *Reynolds*, 111 F. Supp. 589 (D.C. 1953)

(3) Nor was there any showing that the affiant had a direct and personal contact with his reporters or informers.

Mazaka's affidavit does not show that all the information contained in the affidavit was reported directly and personally to him.

In his first paragraph he said his affidavit was based upon "information received officially from other investigators" and "reports orally made to me". The oral reports apparently do not cover the entire affidavit. What is to be concluded from the phrase "information received officially" remains to be seen. It could be anything. It does not necessarily mean a direct report from an investigator to the affiant of what the investigator personally discovered, but could refer as well to the physical transmission of an office file, or to the routine transmission of information through official channels.

Mazaka's affidavit of fact is a useless affidavit at best when he confesses it is based on oral reports of the results of investigations carried on by other people. For all that appears, he could well have framed it from the contents of his office files. He should not presume a vote of confidence in himself from the magistrate before whom he makes his affidavit. As Justice Douglas said in his dissent in the *Jones* case, *supra*, "The duty of the magistrate is non-delegable".

B. Recapitulation

This portion of defendant's brief can be stated in summary form in the language of the Court of Appeals (R.36):

> "If hearsay evidence is to be relied upon in the preparation of an affidavit for a search warrant, the officer or attorney preparing such an affidavit should keep in mind that hearsay statements are only as credible as their source and only as strong as their

> corroboration. And [fol. 128] where the source of the information is in doubt and the corroboration by the affiant is unclear, the affidavit is insufficient."

The petitioner's brief (p. 2) oversimplifies the issue when it states that the Court of Appeals was troubled by only two things, (1) whether the affidavit was a hearsay affidavit and (2) if so, whether the information was "gathered entirely by unreliable informants".

A reading of the decision clearly shows that its concern was broader than this; that not only was it concerned with whether the affidavit was bottomed on mere hearsay or whether the government investigators were reliable—it was also concerned with whether the information was the personal knowledge of the investigators. Repeating again the language of the court below:

> "Thus, the affidavit leaves as a complete mystery the manner in which the Investigators discovered their information. There is no indication whatsoever that any of the evidence gathered through the investigation was based upon the personal knowledge or observation of the Investigators. As a consequence there arises doubt that such information was first-hand to the Investigators. The type of fact-finding activities that can qualify under the term "investigation" are numberless. Investigations can, and frequently do, include the interrogation of witnesses, the receipt of information from informants, the receipt of telephone tips, the checking of files and records, etc. We would have in such a case, not a hearsay affidavit alone, but the distinct possibility of hearsay-upon-hearsay." (R. 35)

The Court then concluded:

> "Because we are unable to determine from Mazaka's affidavit which of the statements therein are based on his own personal knowledge, which are the result of hearsay, and whether such hearsay is di-

rect or not, we hold that the affidavit is insufficient to support the issuance of a search warrant and the search and seizure made pursuant thereto were unlawful and in violation of the constitutional rights of the defendant." (R. 36)

C. Other Hearsay Affidavits Distinguished.

Hearsay affidavits that pass the test are customarily buttressed by one or more elements found lacking in the instant case.

In the *Jones* case itself (362 U.S. 257) the source of the hearsay had direct knowledge himself (not mere suspicion or circumstantial evidence) of the possession of contraband articles. Secondly, the source had given reliable information to the affiant in the past. Thirdly, the defendants 'to-be' were familiar to the Government agents, had admitted to them the use of narcotics, and displayed needle marks. The Court said:

> "Thus we may assume that Didone . . . (the affiant) . . . had the day before been told by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;* but Didone swore to a basis for accepting the claimant's story." (italics supplied)

The Court then went on to recite the further elements listed above, the sum total of which added up to substantial basis for crediting the hearsay.

Contrasting the *Jones* case item by item with the present case, the informants, whoever they were, had not been in the defendant's premises; they had not seen a still or illegal alcohol; they were not reported as rendering reliable information in the past; and the defendant himself was not identified as being familiar to government agents, or as having admitted contact with illegal alcohol in the past. The affidavit was total hearsay, and

contained nothing of a direct nature to substantiate the hearsay.

In a footnote numbered 6 on page 18 of its brief, the Government says that "if an affidavit contains *any* facts sufficient to establish probable cause, the warrant will be upheld" (underscoring supplied) and cites in support of this proposition the *Chin Kay* and *Clay* cases, *infra*. A reading of these cases shows they hold no such thing.

The question, which to some extent may be a matter of degree, is discussed more fully in part III D of this brief. In short, it was the opinion of the Court below that something of substance must be set forth in an affidavit if it is to qualify; and that it ought not to pass if it contains only a trace or a jot of substantial fact imbedded in a swamp of otherwise inconsequential elements.

Turning now to the authorities cited by the Government, in *Chin Kay* v. *United States*, 311 F(2) 317 (C.A. 9th, 1963) the court pointed out (on p. 320) that the hearsay contained in the affidavit "together with Agent Feldman's . . . (and Feldman was the affiant) . . . personal knowledge recited in the last paragraph of the affidavit that the appellant, Chin Kay, was President of the Tong, and had admitted to Feldman that he had a prior conviction under the narcotic laws, would furnish sufficient probable cause . . ."; and in the very next sentence the court referred to them as "essential allegations", not just "any" allegations as the Government's brief would suggest.

The case of *Clay* v. *United States*, 246 F(2) 298 (C.A. 5th 1957) is hardly an authority for the sweeping contention of the Government that any fact, even a morsel, should sustain an affidavit; for that case merely held that a Commissioner was justified in relying on three affidavits that were sworn to before him and that he could well ignore a fourth affidavit improperly sworn to before another agent of the internal revenue service.

In *United States* v. *Woodson*, 303 F(2) 49 (C.A. 6th 1962) cited on p. 17 of Government's brief, the hearsay affidavit was supported by four other independent affidavits of the investigating officers themselves. If this had been done by Mazaka, either by spelling out what each of his investigators did so that a magistrate could exercise independent judgment on the issue of probable cause, or by having them submit individual affidavits, the *Woodson* case would control.

The affidavit in the instant case is as significant for what it did not say as for what it did say. In many cases where hearsay affidavits are sustained on the basis of other substantiation, there is a direct indication that the defendant had been seen elsewhere with contraband articles in his possession, or that he had been seen in places where such articles are known to be, or that he had been seen in association with other parties known to be trafficking in such articles, or that he had been convicted of a similar offense in the past. The instant affidavit contained nothing along these lines, either as direct knowledge or hearsay.

II. CONSIDERATION OF GOVERNMENT'S ARGUMENTS

A. Rebuttal to Government's Summary of Argument. (Brief for the U.S. pp. 7-9)

The Government attorneys have apparently summarized their argument in that portion of their brief entitled "Summary of Argument" appearing on pages 7 and 8, and in the first paragraph of their "Argument" as appearing on pages 8 and 9. In short, their summation appears to begin in the middle of page 7 and run through to the end of page 9 irrespective of the captions inserted.

The summary proposes first that the affidavit was interpreted wholly against the purposes of the document

much as pleadings were construed against the pleader at common law (pp. 7, 8); secondly, that a strict construction of written affidavits would encourage police to act without a warrant in border-line situations rather than apply for a warrant (p. 8) and thirdly, that although the affidavit disclosed "a fully responsible police investigation", the court of appeals turned it down for failure to "negate the possibility" of the information having originated from unreliable sources (pp. 8, 9).

In short reply, the defendant contends that a careful examination of an affidavit or a literal application of its terms should not be casually branded an interpretation "against the purposes of the document". If this were true, then a careless reading would be consistent with its purposes. Secondly, defendant cannot agree that affidavits should be loosely screened lest police resort to action without warrants. More of this later. And thirdly, defendant points out that the government begs the question when it says the affidavit disclosed a fully responsible police investigation, but was rejected because it did not negate the possibility of an unreliable source. The problem lay not in what the affidavit failed to negate, but in what it failed to state. It would serve no purpose to conduct a fully responsible investigation and then ignore the requirement of the Fourth Amendment and Rule 41 that someone must set forth the facts under oath.

B. Rebuttal to Part I of Government's Brief (pp. 10-18)

Item I(1) of the Government's Brief (p. 10) argues that the facts set forth in the affidavit, if true, establish probable cause. The important word is "if". The Court of Appeals was concerned not with the issue of probable cause on the facts alleged, but with whether the affidavit qualified in the first instance.

Item I(2) of the Government's Brief (pp. 11, 12) complains that the Court of Appeals thought the entire affidavit was hearsay, but that since some of it was the personal knowledge of the affiant the Court was plainly wrong. The government has missed the point. The Court of Appeals well knew that the affiant knew some of the facts, but just which facts the affiant knew the Court could not tell. For that reason the Court had to treat the entire affidavit as hearsay; it did not say it was all hearsay. Secondly, the inference that it was all hearsay was with reference to the "essential facts" (R. 33) only. If, for example, the only facts known to the affiant were of no significance on the issue of probable cause, then as to the essential facts "the entire affidavit was based on hearsay".

In Item I(3) of its Brief (p. 12-18) the Government discusses the issue of "substantial basis for crediting the hearsay". First it argues that some of the information (although it doesn't know just which) was within the personal knowledge of the affiant (pp. 13-14) and that this should furnish a substantial basis for the hearsay furnished by others. Secondly, the government says that insofar as the information came from other government investigators, there is no need to name or identify them. (pp. 14-15). With reference to these two points defendant contends that the fact the affiant had personal knowledge of something, where we don't know what that something was, is hardly a basis for substantiating hearsay; and secondly, that the fact the investigators were not named, although it doesn't necessarily defeat an affidavit, doesn't help to substantiate one either.

Thirdly, the government argues that the observations recounted in the affidavit were so "detailed" and were of such a nature that (p. 16) they must be regarded as having been made by government investigators and therefore be reliable and true. This is a novel proposition since

it would dispense with the need of verfication in any case where the yarn appears well spun. It would suggest that the truth of a set of facts depends upon how true or reliable they appear to be, and that if they clearly appear to be true, then they must be true. In short it could mean that an affiant with the best imagination would have the best chance of getting his story accepted as true.

The smell of mash

Lastly, the government argues that adequate substantiation is to be found in the fact that some government investigators smelled mash in the vicinity of the defendant's property. In reply to this, defendant points out two things; one, the assertions as to investigators smelling mash were themselves hearsay, and secondly these assertions constituted but a minor part or small fraction of an otherwise deficient affidavit. The significance of these two arguments will be developed below.

First, we must remember that the entire affidavit is hearsay and that all of its parts are in need of substantiation or lateral support, including the allegations of odor. Surely, these hearsay allegations as to odor can't substantiate themselves or act as their own support. This is not a case where the one who smelled the mash is also the affiant and the one who took the oath. In this respect, this case differs from the *Monette* and *Johnson* cases, *infra*.

In *Monette* v. *United States*, 299 F(2) 847 (C.A. 5th, 1962) the affiant (Norman R. Hilledge) stated that he was "an enforcement agent with the Florida State Beverage Department" and that he "distinctly smelled the odor of fermenting mash emanating from the premises". (Affidavit set out in footnote #3 of decision on p. 849). In other words, the person alleged to have smelled the odor was identified as the affiant.

In *Johnson* v. *United States*, 333 U.S. 10 68 S.Ct. 367 (1948) a search of premises was held invalid for failure of the officers to first obtain a search warrant. The Court did hold with certain qualifications, that mere evidence of odors would be sufficient to justify issuance of a search warrant.

> "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant."

But this of course did not pass upon the question of a hearsay affidavit.

Secondly, we should hopefully recognize and concede that if a hearsay affidavit is to be approved only where some substantiation for crediting the hearsay is presented, that necessary element or prop should be more than a scintilla.

Given an affidavit which fails to satisfy the fundamental requirements of the Fourth Amendment when viewed as a whole, it would be a disservice to the purpose of the Amendment to knit-pick through its contents in search of an iota or two which might conceivably sustain it.

This was, in essence, a focal point of difference in the majority and minority decisions below. Judges Hartigan and Aldrich felt that the affidavit should be viewed as a whole and that it should rise or fall depending upon whether, as a single instrument, it satisfies the rule. The dissent below and the government in its brief have taken the view that it is unfair or unreasonable to read an affidavit as a whole; rather that it should be approved if any of its fractions might qualify as though standing alone, notwithstanding any impression to the contrary

when the affidavit is read in its entirety. In a word, they contend that an entire affidavit should be regarded as strong as its strongest link, not as weak as its weakest link.

Would it not be preferable for the Government to face the problem with some appreciation of the purposes of these affidavits and meet its responsibility head on. In *United States* v. *Sims*, 201 F. Supp. 405 (M.D. Tenn. 1962) the Court deplored the fact that the government produced an affidavit from an officer who was assisting another in watching a house, but did not produce an affidavit from the one he was assisting. The Court said:

> "If the government should fail to produce an important witness available to it in a full adversary proceeding, a presumption would arise that the witness's testimony would be unfavorable. United States v. Di Re, 332 U.S. 581, 593, 68 S.Ct. 222, 92 L.Ed. 210 (1948). In an ex parte proceeding involving so fundamental a matter as the citizen's right to be secure in his home against arbitrary incursions of the police, the same principle should have some application, particularly when the government seeks to base probable cause on a mere pattern formed by otherwise innocent activity."

The best way in which to sum up this point is to quote from the concurring opinion of Judge Aldrich below:

> "I believe it would be bad practice, downgrade the government's obligation, and lead, at best, to difficult performance of their duties by United States Commissioners, if the government were permitted to cart in a barrow-load of what is hopefully pay dirt and leave it to the commissioner, or ultimately the court, to pan out a possible nugget. In this case out of three and a half printed pages only the one sentence referred to by Judge Woodbury regarding odor is affirmatively identified as being to the personal ob-

servation of a government investigator, and even he is not necessarily the affiant. I believe the initial duty should be upon the government to evidence what is reliable and why, and not to introduce a hodge-podge under some general formalistic cover-all."

III. A LITERAL COMPLIANCE WITH THE TERMS OF THE FOURTH AMENDMENT AND RULE 41 IS NOT ONLY REQUIRED AS A MATTER OF LAW BUT IS CONSISTENT WITH GOOD PUBLIC POLICY. HEREIN, OF PART II OF GOVERNMENT'S BRIEF.

A. The History and Purpose of the Fourth Amendment

The right of a home owner or a property owner to a measure of personal privacy within the four walls of his house has been given due recognition for some time. Although a search of one's home may be desired for the purpose of ferreting out and seizing articles suspected of use in the commission of crime, it should be remembered that the owner in many cases is only a suspect and not yet a defendant in any criminal proceeding and that his right of privacy, like the rights of all other individuals, is not to be lightly regarded.

In *United States* v. *Lefkowitz*, 285 U.S. 452 52 S. Ct. 420 (1932) the Court said:

> "The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. Byars v. U.S. 273 U.S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States*, 232 U.S. 383. *Agnello* v. *United States*, 269 U.S. 20, 32." (p. 464)

This concept was not new to the United States of America at the time the Bill of Rights was enacted. The

Fourth Amendment had its forerunner in the English Bill of Rights of 1689, and the reason for the rule has had expression in the writings of Coke and Blackstone.

The concept was given additional emphasis however at the time of the American Revolution, for among the many protests raised by the colonists toward the British King was their sincere and vehement opposition to the so-called Writs of Assistance. These were in the nature of general search warrants, unlimited as to time or object, and presumably deemed necessary by a beleaguered crown for the purpose of dampening the rising tide of an impending revolution.

The authorities are replete with historical explanations as to why the Fourth Amendment was phrased in such rigid language. See *Henry* v. *United States*, 361 U.S. 98 80 S.Ct. 168 (1959). It takes little imagination to picture what must have been the state of mind of the delegates to the constitutional convention when it met in Philadelphia in 1787. These men were still seared with the scars of a revolutionary war begun against their mother country in 1775 at great personal peril and risk to themselves. The indignities they had suffered under colonial rule had pushed them to the breaking point, and it was to throw off tyranny in all forms that the war had been conceived, not only the tyranny of peremptory search and seizure, but that of involuntary quartering and feeding of troops, of a controlled press, of onerous taxes, of closed ports, of insufficient home rule, and the like.

And it is most understandable that these men approved the new constitution for ratification only on condition that a Bill of personal liberties be drafted and appended to the constitution at the first opportunity so as to guard against any repetitions of these acts of the Crown by the now strengthened and somewhat distrusted Federal government.

It was in such a setting that the Fourth Amendment was adopted. In the words of Mr. Justice Frankfurter, "this provision of the Constitution . . . sought to guard against an abuse that more than any other single factor gave rise to American Independence . . ." *Harris* v. *United States*, 331 U.S. 145, 67 S.Ct. 1098 (1947).

B. An Affidavit Should not be Anonymous

Because of the Fourth Amendment, one thing was to be certain. No one's home was to be invaded in the name of law or government unless some individual was prepared to accept full responsibility by going before a proper magistrate and swearing under oath as to the existence of facts sufficient to constitute probable cause.

How chagrined would be the government if after a brutal entry turning up nothing, then to find that the individual responsible for the whole matter had relied solely on what others had told him and knew nothing about it himself.

In *Veeder* v. *United States*, 252 Fed. 414, (C.A. 7th 1918) the Court said:

> "If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law."

In the instant case the affiant could well know nothing, and those on whom he relied for information, being unnamed and unnumbered, could hardly be brought to account. The affidavit was anonymous. For all that the U.S. Commissioner would know, the affidavit could well

have been drawn by a swivel-chair government bureau head from the collective contents of his office files.

The respondent contends that this was not what was contemplated by the framers of the Fourth Amendment.

C. The Government Should not be Allowed to Keep its Witnesses under Wraps

True, a defendant can understand the reluctance of a governmental agency to disclose in advance of trial the names and identities of the parties to utter testimony against him. Nowhere in this case, either in the affidavit supporting the search warrant or in the recitation of overt acts supporting the conspiracy indictment, is there any certain indication as to where or from whom the government obtained its information leading to the issuance of the search warrant.

The defendant of course does not know whether the affidavit was loosely and sloppily drawn, or whether it was artfully drawn for the purpose of keeping the defendant uninformed until the date of trial. But the competitive aspects of trial practice with its adversary tactics on both sides should not be permitted to minimize the government's responsibilities in the pre-indictment stages of search and seizure.

D. Rebuttal to Part II of Government's Brief (pp. 18-24)

In Part II of its brief, the Government complains that the Court of Appeals had an "unduly negative attitude" in interpreting the affidavit (p. 18).

This of course may depend upon one's viewpoint. If one thinks that an attempt to satisfy the Fourth Amendment with a light brush should be sustained, then the lower Court's attitude was a negative one. But if one thinks that an affiant should meet the minimum literal

requirements of the Fourth Amendment and that Mazaka did not, then the lower Court's attitude in this case was a proper and constructive one.

The Government's Brief (p. 18) says the Court of Appeals imposed a burden on the affiant "to negate every inference which might defeat a finding of probable cause." The Government has read the decision in reverse. If the affiant had met the minimum requirements of the Fourth Amendment and Rule 41 he would have been home, and would not have been required to negate anything. The fault lies in the fact that he did not furnish the minimum.

The Government further argues that too strict a construction of affidavits will tend to discourage police applications for search warrants and will result in searches without warrants. The short answer to this proposition is that this was not a case where a search without a warrant would have been legal; but beyond this, the undersigned feels that the courts should not be influenced by the possibilities of such police reprisal. The courts should pass upon applications for search warrants with reference only to the meaning of the appropriate statutes and rules. Let the police agents be encouraged or discouraged as they choose.

Suffice to say, the Government's opinion as to how the Fourth Amendment should be applied is at odds with the Courts. The Government's brief reflects a position that the Fourth Amendment should not be applied too literally or strictly and that all doubts should be resolved in the favor of the Government. This Court seems to have held otherwise.

In *Gouled* v. *United States*, 255 U.S. 298, 41 S.Ct. 261 (1921) the Court said:

> "It has been repeatedly decided that these amendments should receive a liberal construction, so as

> to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well intentioned but mistakenly over-zealous executive officers."

In *Sgro* v. *United States*, 287 U.S. 206, 210, 53 S.Ct. 138 (1932) Chief Justice Hughes said:

> "The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally construed in favor of the individual."

Although the Government has its fair share of earthly burdens, so too the people have theirs. And the purpose and intent of the Fourth Amendment should not be watered down or put in jeopardy by affidavits that either do not meet the test, or which do meet the test but fail to show that they do, lest individuals be deprived of the security and privacy of their homes and eventually their personal liberty.

CONCLUSION

It it respectfully submitted that the judgment of the Court of Appeals for the First Circuit, entered on November 26, 1963, be affirmed.

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